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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1256

KOEHRING COMPANY, *Petitioner*

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

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No.

KOEHRING COMPANY, *Petitioner*

vs.

HYDE CONSTRUCTION COMPANY, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Koehring Company (hereinafter "Koehring "), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case entered on January 24, 1968.

OPINIONS BELOW

The opinions and orders below are as follows:

The September 1, 1964 order and attached memorandum of the United States District Court for the Northern District of Oklahoma (hereinafter "Oklahoma Federal Court") (Appendix A, infra);

The April 18, 1966 order of the Oklahoma Federal Court and the accompanying April 24, 1966 Findings of Fact and Conclusions of Law (Appendix B, infra);

The January 24, 1968 opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter "Tenth Circuit") on review of the Oklahoma Federal Court's April 18, 1966 order (Appendix C, infra); and

The January 24, 1968 opinion of the Tenth Circuit in a companion criminal contempt case, Vardaman S. Dunn vs. United States of America, No. 9142 (Appendix D, infra).

Proceedings on an earlier appeal in the same case are also pertinent. They are:

The July 21, 1965 opinion of the Tenth Circuit on an earlier review of the Oklahoma Federal Court's September 1, 1964 order (Appendix E, infra, 348 F.2d 643);

The January 17, 1966 opinion of the United States Supreme Court on review of that earlier Tenth Circuit's opinion (Appendix F, infra, 382 U.S. 362);

Hyde Construction Company Inc.'s (hereinafter "Hyde") January 25, 1966 petition to this Court for rehearing and motion to amend this Court's mandate to the Oklahoma Federal Court (Appendix G, infra); and

This Court's March 7, 1966, denial of Hyde's petition and motion (Appendix H, infra, 383 U.S. 939).

One of the specific issues involved here was also ruled on in this case by the United States Court of Appeals for the Fifth Circuit (hereinafter "Fifth Circuit"). Thus certain of its opinions and orders are also pertinent. They are:

The September 19, 1963 order of the Fifth Circuit (Appendix I, infra, 324 F.2d 295);

The March 6, 1964 order of the Fifth Circuit (Appendix J, infra); and

The March 10, 1964 order of the Fifth Circuit (Appendix K, infra).

Except as noted, the above opinions and orders are not yet officially reported.

JURISDICTION

The Tenth Circuit entered its judgment on January 24, 1968. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1958).

QUESTIONS PRESENTED

I

When this Court, after its January 17, 1966 reversal of the Tenth Circuit in this case, denied Hyde's motion for further appellate review of the Oklahoma Federal Court's September 1, 1964 order and remanded directly to the Oklahoma Federal Court, did this Court intend to affirm the September 1, 1964 order and thus preclude further appellate proceedings to set aside that order?

II

When a plaintiff, who has filed a suit in federal court praying for a writ of attachment, injunctive relief, a declaratory judgment and a money judgment, subsequently files an identical suit in state court, does 28 U.S.C. §2283 prohibit the federal court from temporarily restraining the plaintiff from proceeding in the state court suit?

STATUTE INVOLVED

28 U.S.C. §2283 provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

I. Basic Facts

This petition involves the violation of a restraining order, the resultant contempt hearing and the injunctive remedy ordered to purge the contempt. All have been presented to and considered by this Court in a previous opinion. 382 U.S. 362 (1966).

The basic controversy involved construction equipment at a U. S. Army Corps of Engineers project near Tulsa, Oklahoma. In August, 1961, Hyde filed this suit in the U. S. District Court for the Southern District of Mississippi (hereinafter "Mississippi Federal Court"). It prayed for a writ of attachment, injunctive relief, a declaratory judgment and a money judgment. (R. 1-6). Ap-

proximately a month later, after Koehring had moved for a change of venue to the Oklahoma Federal Court, Hyde filed an identical complaint against Koehring in the Chancery Court of Hinds County, Mississippi (hereinafter "Mississippi State Court"). (R. 250-55).

After various proceedings in the Mississippi Federal Court case, the Fifth Circuit Court of Appeals on September 19, 1963, reversed the Mississippi Federal Court and ordered that the case be transferred to the Oklahoma Federal Court for "the convenience of the parties and witnesses" and "in the interest of justice." (Appendix I, infra).

Instead of following the Fifth Circuit mandate, the Mississippi Federal Court ordered that the federal case be dismissed. Trial of the long dormant Mississippi State Court case then became imminent. Upon Koehring's petition for mandamus, the Fifth Circuit, on March 6, 1964, *restrained further proceedings in the Mississippi State Court case,* pending hearing on the petition. On March 10, 1964, the Fifth Circuit reversed the dismissal order of District Court and ordered that the Federal case be *instantaneously* transferred to the Oklahoma Federal Court. It also dissolved its restraining order because it no longer had jurisdiction. (R. 16-18). (Appendix K, infra).

II. Proceedings Before the Oklahoma Federal Court

On March 11, 1964, Koehring filed the Fifth Circuit's March 10th order in the Oklahoma Federal Court along with a petition for a temporary restraining order and an injunction against further proceedings in the Mississippi State Court case.

After a hearing that day attended by both parties, the Oklahoma Federal Judge (R. 39-84) granted a tempo-

rary restraining order virtually identical to that which had been issued by the Fifth Circuit. The order temporarily restrained Hyde and its attorneys from proceeding with the Mississippi State Court action and provided for a $10,000 bond to protect Hyde against damages if it were later found to have been wrongfully restrained. (R. 84-85).

Hyde and its attorneys refused to obey the order even though the Mississippi State Court Judge offered to postpone the trial. (R. 290). The trial then proceeded and Hyde obtained a judgment against Koehring in the Mississippi State Court.

After a hearing on March 14, 1964, the Oklahoma Federal Court entered findings and held Hyde in civil contempt.* (R. 92-129). On September 1, 1964, the Court entered the Judgment and Order attached hereto as Appendix A. (R. 162-64). In addition to granting certain costs, the judgment enjoined Hyde and its attorneys, until further order of the Court, from enforcing or collecting the Mississippi State Court judgment.

III. First Appellate Review

Upon the first appeal by Hyde, the Tenth Circuit reversed the September 1, 1964 order. It ruled that the Oklahoma Federal Court did not have jurisdiction over the subject matter of the lawsuit at the time it issued the

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* In a companion criminal contempt case the Oklahoma Federal Court found that Hyde's lead counsel, Vardaman Dunn, deliberately disobeyed its restraining order. His criminal contempt conviction however was reversed by the Tenth Circuit in view of its finding that the Oklahoma Federal Court's March 11, 1964 order was prohibited by 28 U.S.C. § 2283. (Appendix D, infra). We are informed that the Tenth Circuit has withheld its Mandate in the criminal contempt case pending whatever action the U. S. Supreme Court may take in this, the companion civil case.

March 11, 1964 restraining order. On January 17, 1966. this Court, after granting certiorari, reversed the Tenth Circuit and ordered remand directly to the Oklahoma Federal Court (Appendix E, infra).

Hyde petitioned this Court for a rehearing and moved to amend the mandate so as to send the case back, not to the Oklahoma Federal Court, but to the Tenth Circuit for further review of the September 1, 1964 order. (Appendix G, infra). On March 7, 1966, this Court denied Hyde's petition and motion to amend the mandate (Appendix H, infra).

IV. Proceedings After Remand by This Court To The Oklahoma Federal Court

Shortly after return of this Court's mandate to the Oklahoma Federal Court, Hyde moved to dissolve the September 1, 1964 injunction. The Oklahoma Federal Court denied this motion on the grounds that Hyde had already appealed from the granting of the September 1, 1964 injunction and that it had been affirmed by the U. S. Supreme Court. (Appendix B, infra).

V. Current Appellate Review

Hyde filed a notice of appeal from the Oklahoma Federal Court's denial of its motion to dissolve the September 1, 1964 injunction, and Koehring filed a motion to dismiss Hyde's appeal on the grounds of frivolity and a lack of jurisdiction. On July 27, 1966 the Tenth Circuit entered an order denying Koehring's motion. On November 14, 1966, this Court denied Koehring's petition for a writ of certiorari. Hyde and Koehring then again argued before the Tenth Circuit the same issues with respect to the September 1, 1964 order that had been argued before it in early 1965.

On January 24, 1968, the Court of Appeals reversed, ruling that the March 11, 1964 temporary restraining order issued by the Oklahoma Federal Court was prohibited by 28 U.S.C. §2283. It further ruled that the September 1, 1964 order arising out of the civil contempt proceedings for violation of the restraining order be reversed. This Court's earlier refusal to remand to the Tenth Circuit for further consideration of the September 1, 1964 order was held to be of no significance.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With a Prior Decision of This Court in This Case

On January 17, 1966, on review of the same September 1, 1964 order involved here, this Court denied Hyde's request for further review by the Tenth Circuit and remanded the case directly to the Oklahoma Federal Court for further proceedings.

The Tenth Circuit has held that this Court did not intend to settle the validity of the order by remanding the case directly to the trial court (which court clearly had stated that it intended to re-try the case) and by refusing to allow additional appellate review of the September 1, 1964 injunction order. It is submitted that such an interpretation conflicts with the ordinary meaning of this Court's action and, in fact, renders that action meaningless. Cf. *In re Potts,* 166 U.S. 263 (1897) and *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304 (1948)

II. The Decision Below Conflicts With Prior Decisions of Other Courts of Appeal and of this Court

In this very same case and on the very same fact situation, the Fifth Circuit restrained proceedings in the Mississippi State Court. (Appendix J, infra). Only after

the Fifth Circuit had transferred the case instantaneously to the Oklahoma Federal Court and surrendered jurisdiction over the case was the restraining order dissolved.

The Tenth Circuit has now made a ruling which is exactly opposite to that of the Fifth Circuit, i.e., that the federal district court which had received this case the day after the Fifth Circuit had dissolved its restraining order, was powerless to enter a similar restraining order.

Second, in issuing a ruling contrary to that of the Fifth Circuit, the Tenth Circuit cited no extraordinary circumstances requiring a different result. It is clearly the law in other circuits that, absent such extraordinary circumstances, the rule of law of a court of coordinate jurisdiction should not be reversed in the same case. *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 810 (9th Cir. 1963); *Prack v. Weissinger,* 276 F.2d 745 (3d Cir. 1958). These cases concerned the deference to be given the decision of one district judge by another, but the reasoning is directly applicable to courts of appeals.

The decision below conflicts with prior decisions of other courts of appeals as to the flexibility of the "in aid of its jurisdiction" exception. That exception is

> ". . . . meant to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, mold its process to deal adequately with the situation at hand." 1A *Moore's Federal Practice* (2d Ed.) ¶ 0.208 (3.-4) at p. 2321.

An example of a flexible approach was the decision of the United States Court of Appeals for the Fourth Circuit that a federal court, which has before it a declaratory judgment action by insurers to invalidate policies of insurance, may enjoin state court actions on the policies by the insureds, which raised the same issues as the declaratory judgment action in the federal court. In *American Ins. Co. v. Lester,* 214 F.2d 578 (4th Cir. 1954), the

Fourth Circuit held that the exercise of injunctive power in such a case is in aid of and, in fact, "essential to the effective exercise of" the federal court's jurisdiction and, therefore, not prohibited by Section 2283.

Another situation in which an injunction was justified is *Moss v. Burkhart,* 220 F. Supp. 149 (W. D. Okla. 1963), *aff'd. Williams v. Moss,* 378 U.S. 358 (1964), a reapportionment case. There the federal court* enjoined proceedings in a subsequently filed identical state court action, saying:

> "As the litigation now stands, the intervenors are in courts of two sovereign jurisdictions, alleging substantially the same subject matter and seeking substantially the same relief. The gloss of the pleadings may be somewhat different, but the subject matter of the lawsuits and the relief sought are essentially the same. The jurisdiction of both courts may be conceded, as indeed it is. The decisive point of consideration is that early in the course of this litigation, the intervenors invoked this court's jurisdiction and consented to its processes. They now seek to circumvent or frustrate that jurisdiction by provoking unseemly state-federal conflict over the same subject matter. In substance, they would remove a case into which they have intervened to another forum. In this posture, it seems important to sensitive areas of this kind that the Court having first acquired jurisdiction of the subject matter should proceed to a final determination of the tedious questions involved. Any attempted division or dual exercise of the concurrent jurisdiction can lead only to unwarranted confusion, and ought to be avoided. We think that the proper administration of justice and the maintenance of a harmonious state-federal relationship require us to restrain the intervenors from taking their lawsuit elsewhere." 220 F. Supp. at 162-63.

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* This was a three judge federal court consisting of two district court judges and the Chief Judge of the Tenth Circuit Court of Appeals.

The decision of the Tenth Circuit directly conflicts with the *Moss* decision because it allows the plaintiff to invoke the federal court's jurisdiction and consent to its processes and then circumvent that jurisdiction by provoking a federal-state conflict.* It is respectfully submitted that this Court should consider whether a plain reading of the words which allow a federal court to enjoin state court proceedings when "in aid of its jurisdiction" does not include such a situation.

The decision below conflicts with prior decisions of this Court which have established the general rule that the "in aid of its jurisdiction" exception to Section 2283 is not limited to strictly *in rem* cases where some tangible property is actually held. Any action which requests more than strictly *in personam* relief also comes within the ambit of that exception. For example, in *Kline v. Burke Construction Co.*, 260 U.S. 226, 231-32 (1922), this Court said:

> "The rule (as to when there is a 'res' which gives the first court exclusive jurisdiction) is not limited to cases *where property has actually been seized under judicial process* . . . but it applies as well where suits are brought to . . . *marshall assets,* administer trusts, or liquidate insolvent estates, and in all suits of a like nature. . . . The rule is limited to actions which deal either actually or potentially with specific property or objects. . . ." (Emphasis added).

The Tenth Circuit reasoned that both the federal and state suits were strictly *in personam* and, therefore, that Section 2283 prohibited the issuance of a restraining order. The fact that both suits prayed for a writ of at-

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* It should be noted that both the *American Insurance Co.* and the *Moss* cases were purely *in personam,* while the case at bar is *quasi in rem,* i.e., plaintiff, in addition to asking for a money judgment also prayed for a writ of attachment and injunctive relief.

tachment, a declaratory judgment and injunctive relief in addition to making a claim for money damages was held to be irrelevant. That decision conflicts with the rule established by this Court in that it requires that some property actually be seized under judicial process in order to fit within the exception.

III. The Case Presents Important Questions Which Should Be Settled By This Court

This case presents an opportunity for this Court to provide guidelines as to the power of a federal court to enjoin a party from proceeding in a state court case which is neither clearly *in rem* nor clearly *in personam*. Since it seems likely that a large number of cases fall within this middleground, such guidelines are important to many future litigants. Clearly such guidelines are needed since two courts of appeals have reached exactly opposite decisions on the same facts and issues.

This case also presents an opportunity for this Court to outline the consideration to be given the decision of one court of appeals by another in the same case. The law is clear that one district judge should not change a rule of law established by another district judge in the same case without some very good reason. This case presents an opportunity for this Court to establish that rule as between courts of appeal. The result of the decision below is that the Oklahoma Federal Court is held to have been powerless to give the same relief as the Fifth Circuit had given only five days earlier.

This case also presents an opportunity for this Court to explain the significance of its mandate being issued directly to a District Court instead of the Court of Appeals in which the case had been pending. This case

further presents an opportunity for explaining the effect of an order of this Court denying a motion to amend its mandate. Cf. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948).

IV. A Decision in This Case Will Also Govern a Companion Criminal Contempt Case Presently Before the Tenth Circuit

We are informed that the Tenth Circuit has withheld its mandate in the companion criminal contempt case (Appendix D, infra) pending whatever action this Court may take in this case.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated: March 22, 1968

APPENDIX A

[*United States District Court, Northern District of Oklahoma*]

MEMORANDUM

The Court has for decision here the question of whether sanctions for civil contempt can be imposed against the plaintiff, Hyde Construction Co., and its attorney Vardaman S. Dunn.

Obtaining jurisdiction by attachment, plaintiff instituted this action in a United States District Court in Mississippi to recover a money judgment for breach of contract and for a declaratory judgment and injunction. The case has been transferred to this Court.

Plaintiff then brought suit in a Mississippi state court against the same defendant on the same cause of action and obtained jurisdiction by attachment.

Dalrymple Equipment Company was the resident attachment defendant in both actions.

A temporary restraining order was issued in this case restraining the parties from proceeding in the state court action. Hyde and its attorneys had notice of it. It and they proceeded with the state court trial over a period of some fifteen days and concluded the trial on March 26, 1964. During that period of time the restraining order was in force, and this Court had issued and served on Hyde and its attorneys an order to show cause why they should not be found in contempt.

On March 14th, the Court entered its findings that Hyde and its attorneys, Vardaman S. Dunn and Charles Clark, were in contempt, and took under advisement the matter of imposing sanctions. On April 9, 1964, Charles Clark was purged of civil contempt.

On March 27, 1964, this Court denied Koehring's application for preliminary injunction and the temporary restraining order as extended, expired by lapse of time.

A hearing has been held concerning the sanctions, if any, to be imposed for the civil contempt.

Hyde urges that upon denial of the application for a preliminary injunction all matters relating to civil contempt were terminated. Salvage Process Co. v. Acme Tank Cleaning Corp., 1936, 2 Cir. 86 F. 2d 727; Worden v. Searls, 1886, 121 U. S. 14, 30 L. Ed. 853; U. S. v. United Mine Workers, 1946, 330 U. S. 258, 294-5, 91 L. Ed. 884, 913.

In the last cited case, the Court's remarks as to obligation for compliance (p. 294) indicate that expiration of an order is not equivalent to reversal; the temporary restraining order and preliminary injunction there involved were sustained, not reversed and the language at pp. 294-5 as to the effect of reversal appears to be obiter dicta. In the other cases cited, the "basic action" was for injunctive relief, the preliminary injunction awarded some of that relief, and plaintiff lost its case on the merits. The contempt order thus was reversed upon and as a part of the adjudication in the basic action that plaintiff had no rights which were violated. See 121 U. S. at p. 25 and 86 F. 2d 725.

In the case at bar the temporary restraining order does not touch the merits. It was wholly ancillary and was designed to halt prosecution of the state court action at least until further inquiry could be made. It has not been set aside or reversed. The order denying the preliminary injunction did not affect it nor constitute a determination that it was improvidently entered. On the contrary, the findings and conclusions are that it was properly entered.

A major reason for denial of the temporary injunction was that the acts sought to be enjoined had already been committed. The authorities cited do not sustain the contention made. Compare Brougham v. Oceanic Steam Navigation Co., 1913, 2 Cir., 205 F. 857; Land v. Dollar, 1951, D.C. Cir., 190 F. 2d 366, cert. dismissed 344 U. S. 806, 97 L. Ed. 628; Blackwelder v. Crooks, D. C., D. C. 1957, 151 F. Supp. 26, 28, affirmed in part and reversed in part, 252 F. 2d 854; Cummings-Landau Machinery Co. v. Koplin, Ill. 1944, 54 N. E. 2d 462. These cases may not be precisely in point. Indeed, it may be that here is a case of first impression.

The verified petition for order to show cause and the order to show cause are a sufficient basis for this proceeding. The parties charged have filed no answer or other pleading denying nor have they otherwise denied violation of the temporary restraining order. The proof of violation is complete and sufficient. There is no fatal defect in the procedural aspects of the case. U. S. v. United Mine Workers of America, supra, 330 U.S. 258, 295-8, 91 L. Ed. 884, 914-15; National Labor Relations Board v. Tupelo Garment Co., 1941, 5 Cir., 122 F. 2d 603.

The respondents have elected to test the order by disobeying it. The law is clear as to the consequences of that course of action. The Court may impose sanctions to deprive the contemnors of the fruits of their contemptuous conduct, to restore the status quo as nearly as may be, to coerce obedience and to compensate the opposite party for loss caused by disobedience. "The measure of the court's power * * * is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 1949, 336 U. S. 187, 193, 93 L. Ed. 599, 605. And see: Deeds v. Gilmer, 1934, Va., 174 S. E. 37; Keys v. Alligood, 1919, N. C., 100 S. E., 113; Parker v. U. S.,

1946, 1st Cir., 153 F. 2d, 66; U. S. v. Onan, 1951, 8 Cir., 190 F. 2d 1; Leman v. Krentler-Arnold Hinge Last Co., 1931, 284 U. S. 448, 76 L. Ed. 389; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U. S. 399, 67 L. Ed. 719.

It is made to appear to this court that a Mississippi state court has enjoined Koehring Company from proceeding to trial of this case in this Court. Aside from evidence thereof, this and other Federal Courts may take judicial notice of such a proceeding. Wagner v. Fawcett Publications, 1962, 7 Cir., 307 F. 2nd 409. No decision concerning that injunction is here made, but Donovan v. Dallas, decided June 8, 1964, 377 U. S. 408, 12 L. Ed. 2d (Adv. Sheets) 409 is of interest. The conflict between courts has been brought about by events originating in respondents disobedience of the temporary restraining order of this court. It is hoped that there may be an orderly resolution of that conflict.

An order will be entered in accordance with the views expressed in this memorandum.

Allen E. Barrow
U. S. District Judge
Northern District of Oklahoma

Filed Sept. 1, 1964

JUDGMENT AND ORDER

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining

order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred

reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed Sept. 1, 1964

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYDE CONSTRUCTION COMPANY, INC.,
Plaintiff,

vs.

KOEHRING COMPANY, and C. S. JOHNSON COMPANY, et al,
Defendant.

Civil Action No. 5911

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause, having been heard before the Court on April 8, 1966, all of the parties appearing by counsel, and the briefs having been read and arguments of counsel having been heard and the Court having been fully advised in the premises, it is hereby decided and found as follows:

FINDINGS OF FACT

1. On September 1, 1964, this Court in a civil contempt proceeding issued an order providing among other things that the above captioned case be tried in this Court as if Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, had not been tried and as if the judgment therein had not been rendered.

2. This order was appealed to the U. S. Court of Appeals for the 10th Circuit by Plaintiff. The Court of Appeals in part reversed this Court's ruling.

3. Defendant filed a petition for certiorari to the U. S. Supreme Court. The U. S. Supreme Court granted certiorari, reversed the ruling of the Court of Appeals and remanded the action to this Court.

4. Plaintiff petitioned the U. S. Supreme Court for a rehearing, alleging that the case should instead be remanded to the U. S. Court of Appeals for the 10th Circuit. This petition for rehearing was denied and the case was remanded to this Court.

CONCLUSION OF LAW

To grant this motion would frustrate the September 1, 1964 order of this Court as affirmed by the U. S. Supreme Court and, therefore, the motion is overruled.

Dated this 24th day of April, 1966.

Allen E. Barrow
United States District Judge

[SEAL]

APPENDIX B (Cont'd)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORDER

On April 8, 1966, the following four motions of Plaintiff came on for hearing: (1) Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause; (2) Amended and Supplemental Motion to Transfer Back; (3) Motion in Reference to Defendant's Notice to Take Depositions; and (4) Motion for Leave to File An Amended and Supplemental Answer to Defendant's Counterclaim and Amended Counterclaim. The Court, having studied the briefs and heard oral argument,

ORDERS that Plaintiff's Motions (1), (2), and (3) be, and are overruled;

ORDERS that Plaintiff's Motion (4) be, and is granted and Defendant is granted leave, within 10 days after the filing of Plaintiff's Amended and Supplemental Answer, to move to strike the same; and

FURTHER ORDERS that Defendant's attorneys prepare Findings of Fact and Conclusions of Law in accordance with the views expressed by the Court.

DATED, this 18th day of April, 1966.

s/ Allen E. Barrow
United States District Judge

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8717 — JANUARY TERM, 1968

HYDE CONSTRUCTION COMPANY, INC., Appellant, v. KOEHRING COMPANY, Appellee.	Appeal from the United States District Court for the Northern District of Oklahoma

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Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Oklahoma. Hyde contracted with Koehring for the design and installation by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U. S. C. § 1292(b).

The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F. 2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964,

and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial.

On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's attorneys, and the state court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in

the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceedings in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 857.

On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further proceedings in the

Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966. See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is disposed of by an opinion filed contemporaneously with the opinion in this case.

We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U. S. C. § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might

take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue — one in state court and one in federal court. Ordinarily, one trial of a controversy is enough.

Koehring argues that the issues raised by the motion to dissolve the injunction were finally and completely determined by the decision of the Supreme Court in Koehring Company v. Hyde Construction Company, 382 U.S. 362. That case in the court of appeals presented questions as to the jurisdiction of the Oklahoma federal court and as to the validity of the injunction. The court of appeals held that the Fifth Circuit's order of instanter transfer was invalid and did not reach the other issues. The Supreme Court granted certiorari and reversed summarily. In so doing it summarized the action of the district court and recited the provision of the order that "the civil suit between the parties [be] retried — this time in Oklahoma and in federal court." The Court concluded that, in the special circumstances of the case, the Oklahoma federal court acquired jurisdiction on March 11 under the Fifth Circuit's instanter transfer and that "the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground." The Court remanded the case to the Oklahoma federal court "for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions."

Koehring argues that the decision of the Supreme Court means that the federal injunction against the state trial was valid. We do not read the opinion of the Supreme Court to intend such effect. The validity of the injunction is not discussed in spite of the fact that it was

attacked on grounds which raise serious questions bearing on the relationship of federal and state courts. The use in the opinion of the word "retried" has no significance to us because it appears in a recital of the provisions of the order of the Oklahoma federal court. The remand is for further proceedings consistent with the opinion but the opinion does no more than sustain the transfer jurisdiction. The remand recognizes the right of the parties to seek a transfer back to the federal court in Mississippi. This is not consistent with any idea that the Supreme Court intended to order a trial on the merits in Oklahoma federal court.

Hyde filed in the Supreme Court a "Petition for Rehearing And Motion To Amend Order of Remand." Therein it pointed out that the court of appeals, because of its ruling on the jurisdictional point, had declined to consider the other issues presented by Hyde. Such questions included the effect of the voluntary dismissal under Rule 41(a)(1) and the validity of the restraining order and injunction under 28 U.S.C. § 2283. Hyde asked that the case be remanded to the court of appeals for the determination of these questions. The Supreme Court denied the petition for rehearing and the motion to amend the order of remand. See Koehring Company v. Hyde Construction Company, 383 U.S. 939. Koehring interprets this denial as decisive of the points raised. We see the situation differently. In the exercise of its discretionary powers, the Supreme Court chose to confine its decision to the narrow jurisdictional point and in so doing did not express an opinion on the merits of the injunction. This failure to express an opinion does not amount to a determination that the points raised were decided adversely to Hyde. The points are substantial — not frivolous. One relates to the effect of a condi-

tional dismissal under Rule 41 (a) (1) — a point on which no appellate authority appears to exist. The other relates to the propriety of the injunction under one of the exceptions to 28 U.S.C. § 2283. It seems improbable to us that the Court would dispose of the merits of a case in this sensitive area without full-fledged presentation and without discussion of pertinent decisions.[1]

Koehring also argues that the remand to the district court rather than to the court of appeals shows that the Supreme Court intended that the validity of the injunction was settled. We find no such intent. Although the remand could have been to the court of appeals for consideration of the questions other than jurisdiction, the fact that such remand was not made does not mean that those other issues were decided. In our opinion the Supreme Court did not foreclose Hyde from the assertion of the issues now raised.

Koehring next urges that on the return of the case to the district court Hyde may urge only new and unforeseen circumstances in a motion to dissolve the injunction.[2] This argument assumes that the points raised by Hyde have been foreclosed. We reject the assumption. Hyde is entitled to have its contentions heard in an appellate court. Additionally, there is a changed circumstance. The Mississippi state court in personam judgment has been sustained, with a reduction in damages, by the state supreme court after full submission and consideration of jurisdictional questions; and the judgment has become

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[1]E.g. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, and Kline v. Burke Construction Company, 260 U.S. 226, 232-233.

[2]See System Federation v. Wright, 364 U.S. 642, 647, (modification of a consent decree because of change in law), and United States v. Swift & Co., 286 U.S. 106, 114, (claim of changed facts).

final because of the failure of Koehring to seek certiorari review.

These conclusions make necessary consideration of the attack by Hyde on the injunction. Hyde says that the Mississippi federal court action was dismissed voluntarily under Rule 41(a)(1) before the transfer to the Oklahoma federal court. After the Court of Appeals for the Fifth Circuit ordered the district court to transfer the case to the Northern District of Oklahoma, Hyde filed in the Mississippi federal court a motion in three parts. Part A sought the revocation of the transfer order because of changed circumstances. Part B was a notice of dismissal under Rule 41(a)(1). Part C said that if Hyde was mistaken under Parts A and B, then it requested a dismissal by the court. The court declined to revoke the transfer as requested under Part A, held that the notice of dismissal was good, and dismissed the action.

Rule 41(a)(1) provides for a dismissal without order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer * * *." Hyde said, in effect, to the Mississippi federal court that if the case was not kept there, the case was dismissed. Such a conditional notice of dismissal is not within the scope of Rule 41(a)(1). The purpose of that rule is to provide a means for terminating an action automatically by filing with the clerk a notice of dismissal. That notice closes the file; no order of the court is needed.[3] If the conditioning of notices of dismissal is allowed, the clerk of the court will be called upon to exercise a duty more than merely ministerial. Instead of simply closing the file of a case once the notice of dismissal is filed, the clerk will have to construe the condition and perhaps even become a fact-

[3]American Cyanamid Co. v. McGhee, 5 Cir., 317 F. 2d 295, 297.

finder to determine when the condition is satisfied. This defeats the purpose of Rule 41(a)(1) to provide a quick, automatic means of ending an action.

In the instant case, Koehring had served an answer on Hyde before the condition was met. Rule 41(a)(1) is effective only until an answer is served by an adverse party. Hyde argues that a party cannot avoid the effect of a notice of dismissal without prejudice by answering after he has been notified that plaintiff intends to file a notice of dismissal. The cases cited for this point hold only that a defendant may not defeat Rule 41(a)(1) in removal cases by winning the race to the courthouse to file an answer immediately after the removal transcript is filed, or by serving an answer if he has notice that the plaintiff wishes to dismiss as soon as the transcript is filed. That is a far cry from saying that the plaintiff may prevent the defendant from answering for so long as the plaintiff is seeking determination of preliminary procedural issues.

The fact that the court, rather than the clerk, made the order of dismissal does not change the situation. The court acted on the basis that the notice under Rule 41(a)(1) was valid. The Court of Appeals held directly to the contrary and said "the District Judge is hereby ordered to vacate the order or orders of dismissal entered on February 24, 1964 * * *."[4]

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[4]In an unpublished opinion appearing in the record in this case, the Fifth Circuit said: "* * * the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District

So far as we are concerned this action by the Fifth Circuit is the law of the case. We believe that it is correct and we accept it. In our opinion the attempted dismissal did not oust either the Mississippi federal court or the Oklahoma federal court of jurisdiction.

The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C. § 2283. That statute forbids a federal court to enjoin state court proceedings except when expressly authorized by Congress "or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." Koehring says that the injunction is necessary to protect the federal jurisdiction.

The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the

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Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a 'filing [of] a notice of dismissal' as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion."

[5]See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U.S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67, 70.

state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant "does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required."[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to jurisdiction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the "in aid of its jurisdiction" exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not

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[6]Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F. 2d 89, 100, modified in nonpertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F. 2d 582, 585.

[7]See Mississippi Code Annotated (1956) § 2729.

[8]Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F. Supp. 955, 966.

conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order of the court below restraining the entire state action was not necessary and cannot be sustained.

The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory

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[9]See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67.

[10]In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction, * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. We conclude that the injunction was not within the § 2283 exception permitting a stay in aid of federal jurisdiction.

Koehring argues further that the stay was permissible to protect or effectuate the federal judgment of the Fifth Circuit ordering the transfer to the Northern District of Oklahoma. We have held that the protection-of-judgments exception in § 2283 was included within the 1948 revision of the Judicial Code to overcome the effect of the decision in Toucey v. New York Life Insurance Co., 314 U.S. 118, and "to give Federal Courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts."[13] It may be that in some situations the exception extends to interlocu-

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[11]28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

[12]See IA, Moore Federal Practice ¶ 0.220, p. 2604.

[13]Jackson v. Carter Oil Co., 10 Cir., 179 F. 2d 524, 526-527, cert. denied 340 U.S. 812.

tory orders[14] but we have no reason here to recognize any such exception. The Fifth Circuit decided only where the federal case should be tried under the federal *forum non conveniens* law. The restraining order against proceeding in the Mississippi state court was expressly vacated by the Fifth Circuit. The Mississippi proceedings in no way conflict with the decision that the Northern District of Oklahoma is the more convenient federal forum. Our conclusion is that the Oklahoma federal injunction is not within any of the exceptions found in § 2283 and consequently is forbidden by that statute.

The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the efficacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties — Koehring and Hyde — and identity of subject matter — jurisdiction of the Mississippi court to proceed. The

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[14]See Sperry Rand Corporation v. Rothlein, 2 Cir., 288 F. 2d 245, 249.

[15]See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 842-850.

principles of res judicata apply to questions of jurisdiction.[16]

Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers

[16]American Surety Co. v. Baldwin, 287 U.S. 156, 166.

[17]See Donovan v. City of Dallas, 377 U.S. 408, 412.

[18]Hart and Wechsler, The Federal Courts and The Federal System, 1057.

[19]Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F. 2d 643, 647, reversed on other grounds 382 U.S. 362.

of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such remedy "falls with an injunction which events prove was erroneously issued."[22] Accordingly, the adjudication for civil contempt and the penalty imposed therefor cannot stand.

Hyde urges us to order the dismissal of the case on the ground of res judicata. We decline to do so. The case is here on the sole issue of the propriety of the denial of the motion to dissolve the injunction. Our decision on res judicata is limited to the application of that principle to

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[20]See Pan American World Airways, Inc., v. Flight Engineers' International Association, 2 Cir., 306 F. 2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F. 2d 931.

[21]Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

[22]United States v. United Mine Workers of America, 330 U.S. 258, 295.

the question of the jurisdiction of the Mississippi courts to proceed with the state trial. The merits are not before us. The plea of the application of the bar of res judicata to the merits, and all other questions pertaining to the merits of the controversy, must be decided by the district court in the first instance.

The injunction is dissolved. The judgment for civil contempt is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 9142 — JANUARY TERM — 1968

VARDAMAN S. DUNN, Appellant, v. UNITED STATES OF AMERICA, Appellee.	Appeal from the United States District Court for the Northern District of Oklahoma

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is a companion case to Hyde Construction Company v. Koehring Company, No. 8717, decided this day. Reference is made to the factual background there described.

Appellant Dunn was found guilty of criminal contempt because of the violation of a March 11, 1964, temporary restraining order entered by the United States District Court for the Northern District of Oklahoma. That order forbade Hyde Construction Company, its attorneys and agents, from proceeding with a state action pending in the Chancery Court of Mississippi. We have held in case No. 8717 that such order was invalid under 28 U.S.C. § 2283. Dunn contends that the federal court did not have jurisdiction because the case had been volun-

tarily dismissed under Rule 41(a)(1), F.R.Civ.P. We have held to the contrary.

Dunn says that he had no free choice because the Mississippi court had ordered him to proceed with the trial before it. The record does not sustain the contention.[1] Dunn further argues that his duty to his client required him to proceed with the Mississippi trial. Devotion to a client is no excuse for the violation of a court order.

Our decision that the restraining order was invalid because forbidden by 28 U.S.C. § 2283 does not destroy the criminal contempt conviction. When a court has juris-

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[1]The following occurred in the Mississippi state court after the parties had been notified of the Oklahoma federal court restraining order.

By Mr. Dunn. * * * We are in this Court. We are under the jurisdiction of this Court. We have our witnesses here. We have our records here. We have already commenced the trial of this case, and I concede it that under the order of this Court we shall proceed, and therefore I am ready to proceed.

By the Court: And is it your desire to proceed?

By Mr. Dunn: Yes, sir.

* * *

By the Court: * * * The Court is not forcing the issue. Of course, if you gentlemen want to recess we probably can recess this trial to March 23rd.

* * *

By Mr. Landrum (counsel for Koehring): Judge, I would like to make our position clear with respect to the announcement made by the Court, and that is that counsel for the defense are perfectly willing for this case to be deferred until March 23, and request that it so be deferred.

By the Court: I think in order for an agreement to be entered it would be necessary for counsel for both sides to agree to it.

By Mr. Dunn: Your Honor, I state again that I am in this Court and prepared for trial. I am here to try the case at great inconvenience and expense, and I am here under the order of this Court that this case is to be tried commencing at 2:00 P.M. today, and I have every intention of carrying out the order of this Court.

By the Court: All right, we will be back in the morning at 9:30."

The foregoing is taken from the record before us in No. 8717.

diction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review.[2] The district court had the requisite jurisdiction. Although it may be that Dunn did not have an opportunity to appeal the restraining order which had a life of only ten days,[3] he should have obeyed it for that short period. The Supreme Court has said that: "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, * * *"[4]

Our greatest difficulty is that the district court acted on the assumption that its order was valid. We have held to the contrary with the result that Dunn is subjected to punishment for disobedience of an invalid order. A somewhat comparable situation was before the Supreme Court of the United States in Donovan v. City of Dallas, 377 U.S. 408. In that case an attorney and others had been convicted of criminal contempt by a Texas state court for violation of an order which the Supreme Court held was invalid. The Supreme Court pointed out that the Texas state court acted on the assumption of validity of the order and said (Id. at 414):

> "Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order. Whether the Texas court would have punished petitioners for

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[2]Frank v. United States, 10 Cir., 384 F. 2d 276, citing Howat v. Kansas, 258 U.S. 181, 189, and United States v. United Mine Workers of America, 330 U.S. 258, 293.

[3]In Hyde Construction Company v. Koehring Company, opinion filed this date, we recognize that the general rule is that a temporary restraining order of this type is not appealable.

[4]United States v. United Mine Workers of America, 330 U.S. 258, 294. See also Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time."

We believe that the same result should be reached in the case at bar. Accordingly, the judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX E

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July Term 1965

HYDE CONSTRUCTION COMPANY, INC., Appellant, vs. KOEHRING COMPANY, Appellee.	No. 7929
VARDAMAN S. DUNN, Appellant, vs. KOEHRING COMPANY, Appellee.	No. 7930

Appeals from the United States District Court
for the Northern District of Oklahoma

Before PICKETT, LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

These appeals are taken from an order and decree[1] entered by the United States District Court for the Northern District of Oklahoma springing from a finding that appellants were in civil contempt for disregarding a temporary restraining order issued by the court. The restraining order had been directed to "Hyde Construction Company, Inc., its attorneys, agents, and all persons acting in concert therewith" and required them to cease and desist from proceeding with a civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The appellant Dunn is a member of the bar of Mississippi and attorney for Hyde Construction Company. It is not disputed that appellants did disregard the court's order and, through the expedient of over-simplification, we state the present appellate issue to be a determination of the validity of the restraining order.

Appellant Hyde Construction Company was prime contractor on a construction project concerning the erec-

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[1]"Now on this 1st day of September, 1964, It Is Ordered, Adjudged and Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so re-

tion of the Keystone Dam Spillway in the State of Oklahoma. It contracted with appellee Koehring Company for the latter to design and install a concrete plant for Hyde's use in the project. A dispute between the parties arose in reference to the performance of this contract, and on August 30, 1961 Hyde filed suit against Koehring in the Federal District Court for the Southern District of Mississippi, praying for writs of chancery attachment, injunctive relief, a declaratory judgment, and a money judgment of $500,000 for breach of the contract. Koehring contested the jurisdiction of that court, and in the alternative moved for a transfer of venue to the Federal District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a). Apparently unsure of the jurisdiction of the Mississippi federal court, Hyde on September 27, 1961 filed suit in the state chancery court on the same breach of contract action, obtaining jurisdiction by virtue of chancery attachments upon debt-

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[1](Continued)
strained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in

ors of Koehring.[2] The suit was not actively prosecuted at that time pending the disposition of Koehring's contentions before the Mississippi federal court.

In July of 1962 the Mississippi federal court denied Koehring's motions for transfer but certified the ruling for interlocutory appeal under 28 U.S.C. §1292(b) to the United States Court of Appeals for the Fifth Circuit. On September 19, 1963 the Fifth Circuit reversed the federal district court on the venue question and remanded the case to the district court for transfer to the Oklahoma federal court under 28 U.S.C. §§1404(a) and 1406(a). Koehring Co. v. Hyde Construction Co., 324 F. 2 295. Hyde then petitioned the Fifth Circuit for rehearing, which stayed the order until that petition was denied on February 5, 1964. During this period the state court action was progressing toward trial, March 9, 1964 being set as a tentative date. On December 30, 1963, just prior to the Fifth Circuit decision on Hyde's petition for rehearing, Koehring petitioned that court to enjoin the state suit, which the Fifth Circuit on January 27, 1964 refused to do, without prejudice to Koehring's right to apply to the Oklahoma federal court for such relief.

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[1](Continued)

favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate."

[2]At the time these suits were commenced, Rule 4(e) Fed. R. Civ. P., had not yet been amended to permit the initiation of federal court actions through use of state attachment procedures. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 4, Fed. R. Civ. P. (Supp. 1964).

Hyde then filed in the Mississippi federal district court, on remand, a motion to consider changed circumstances and not transfer the case to Oklahoma; in the alternative, Hyde sought voluntary dismissal of that action in accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure. Up to this time Koehring had not yet filed an answer on the merits but did so on February 20 pending the decision. On February 24, 1964, the Mississippi federal district court denied Hyde's motion in reference to the transfer issue but granted the motion for voluntary dismissal without prejudice, reasoning that the case had not yet been transferred to Oklahoma and that Rule 41(a)(1) allowed dismissal upon plaintiff's motion at any time before the filing of an answer.

On March 6, 1964 Koehring obtained ex parte from the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court suit pending determination of a writ of mandamus which had been filed by Koehring in the Fifth Circuit on March 4, petitioning that court of appeals to direct the Mississippi federal court to vacate its decision dismissing the action. The mandamus application was heard on March 10, and on that same afternoon the Fifth Circuit rendered its decision in Koehring's favor, vacating the Mississippi federal court's decision dismissing the action[3] and ordering the Mississippi federal judge to transfer the action. The order further stated that:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma,

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[3]Appellants urge us to redecide the question of Hyde's right to dismissal, contending that this court is not bound by the Fifth Circuit determination. We see no necessity for inquiry into such issue for it is only the fact of the decision that is pertinent to our present determination.

this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (Emphasis supplied.)

The order was concluded by the Fifth Circuit's vacating its temporary restraining order against Hyde's proceeding in the state court action because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court." Meanwhile, trial in the state court action had been set for the next day, March 11, at 2:00 pm.

At 9:45 a.m. the next day, March 11, counsel for Koehring presented to the Oklahoma federal court a certified copy of the Fifth Circuit's order together with a motion for an injunction and a temporary restraining order forbidding further proceedings in the state court suit, which was to begin trial later that same day. Both Hyde and Koehring were represented by counsel before the Oklahoma court and argued the merits of the injunction and restraining order, and just before 2:00 p.m., when the Mississippi trial was to begin, the temporary restraining order was granted to preserve existing conditions pending a decision on the jurisdiction of the Oklahoma federal court and the propriety of Koehring's motion for an injunction.[4] The news of this order reached Hyde's attorneys in Mississippi, including appellant Dunn, that same afternoon but they declined to obey it and continued on with the trial of the suit[5] until its conclusion on about March 25, when Hyde was awarded a judgment of over $486,000.

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[4]Koehring's motion for a "preliminary" injunction staying Hyde from proceeding in Mississippi was ultimately denied on April 9, 1964 after a full hearing. Among the reasons given by the court for denying the injunction was that "the state court trial has now been completed and therefore much of the initial problem and urgency for Koehring is now moot."

[5]The Mississippi state court on March 12 ordered the state trial to proceed.

On March 12 Koehring petitioned the court below to cite Hyde and Dunn for contempt; the court issued an order to Hyde and its attorneys to show cause on March 14 why they should not be found in contempt. At the hearing Hyde's counsel appeared but briefly and Dunn did not appear at all, but the court nevertheless entered findings and held Hyde and Dunn in civil contempt[6] Thereafter, on September 1, 1964, the court entered the judgment noted (Note 1, supra) and from which this appeal is taken.[7]

At the outset we are faced with the question of our own jurisdiction to review the September 1 order. Normally, a judgment for civil contempt against a party is not reviewable on appeal from that judgment but only on appeal from a final judgment in the related action. Fox v. Capital Co., 299 U.S. 105; Duell v. Duell, D.C. Cir., 178 F$_2$ 683, 687; Taylor v. Bowles, 9 Cir., 152 F$_2$ 311. However, a judgment for civil contempt against a non-party, such as Dunn, can support an appeal without dependence upon the related action if the judgment of contempt is, itself, final. Bessette v. W. B. Conkey Co., 194 U.S. 324; In re Manufacturers Trading Corp., 6 Cir., 194 F$_2$ 948; Fenton v. Welling, 9 Cir. 139 F$_2$ 608; 6 Moore's Federal Practice, ¶ 54.17 at p. 154. And

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[6]Appellant Dunn was also found to be in criminal contempt and a warrant of arrest issued March 14. The Mississippi state court issued an order purporting to restrain any U.S. Marshal from making the arrest until the state trial, then in progress, was completed. The arrest was made on March 16 and Dunn was immediately released from restraint by writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. This action is now pending upon appeal as No. 22081 in the Fifth Circuit.

[7]The court's order is clear to the effect that the injunction preventing collection of the Mississippi judgment is wholly dependent upon the findings and conclusions relative to the contempt judgment and must stand or fall with it.

here the problem is compounded by the question of whether a final judgment of contempt has ever been entered since the district court reserved its decision as to whether appellants will be required to pay further sums. However, 28 U.S.C. §1292(a)(1) gives jurisdiction to courts of appeals on appeals from interlocutory orders of the district courts "granting * * * refusing or dissolving injunctions * * *," and in this case the district court enjoined appellants from enforcing the state court judgment. Since the injunction is inseparable from the contempt orders, whose validity in turn depends upon the jurisdiction of the lower court, this court may and will review the entire order of September 1, 1964. Cf. Stewart-Warner Corp. v. Westinghouse Electric Corp., 2 Cir., 325 F. 2 822, cert. denied, 376 U.S. 944.

As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. §2283.[8] Initially, Koehring claims that the contempt rulings were correct regardless of whether the district court had jurisdiction over the parties and over the subject matter under the doctrine that a court has jurisdiction to determine its own jurisdiction except in cases of "plain usurpation" clearly not here applicable. Since a court has such jurisdiction, it has power to punish for violations of orders entered pursuant to it. Therefore, argues Koehring, the contempt orders must be affirmed regardless of the court's ultimate jurisdiction over the case.

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[8]Section 2283.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This position of Koehring overlooks the fact that it was civil contempt for which Hyde and Dunn were cited. While a court has the power to punish for criminal contempt for actions that are an affront to its dignity, even if the violation was of an order that was incorrectly entered, civil contempt is remedial and accrues to the benefit of the opposing party who has no claim to reimbursement for offenses solely against the court. As the Court stated in United States v. United Mine Workers, 330 U.S. 258, 295, respecting civil contempt: "The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." And see Heasley v. United States, 8 Cir., 312 F$_2$ 641, 648-49; Cliett v. Hammonds, 5 Cir., 305 F$_2$ 565, 570. Thus, the correctness of the contempt orders is dependent upon the jurisdiction of the district court, and the contempt orders must fall if that court's actions were beyond its statutory power.

The only method by which the district court could have acquired jurisdiction below was by way of transfer of the action originally filed in the Mississippi federal court. And since the Mississippi court did not transfer the papers until March 16, subsequent to the entering of the subject restraining order, the court below did not obtain jurisdiction prior to March 16, under normal procedures, since the transfer of the papers, etc., to the transferee court is considered essential to that court's acquiring jurisdiction. See, *e.g.*, Drabnik v. Murphy, 2 Cir., 246 F$_2$ 408; Wright on Federal Courts, p. 143. The court below, therefore could obtain jurisdiction only if the Fifth Circuit's order, by itself, constituted a transfer, which that court clearly did intend it to be. But the transfer statutes, 28 U.S.C. §§ 1404 and 1406, both specify

that only the "district court" may transfer, and it is basic that the appellate jurisdiction of all inferior federal courts is wholly dependent upon statute. Carroll v. United States, 354 U.S. 394. Koehring, not disputing these general principles, nevertheless argues that the Fifth Circuit had the power to "constitute" its order a transfer by virtue of 28 U.S.C. § 1651, the "All-Writs" statute authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It is not apparent which particular "writ"[9] was issued by that court nor that the order was necessary or appropriate in aid of its own jurisdiction or judgment. But it is clear that the Fifth Circuit was attempting to accomplish something it normally would be powerless to do, for a transfer must, according to statute, be made by the district court, *and* it is not effective until the papers have been transferred. The Supreme Court recently stated that "extraordinary writs are 'reserved for really extraordinary causes,' * * * and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245. Section 1651 "does not contain a new grant of judicial power," United States *ex rel.* Wisconsin v. First Fed. Sav. & Loan Ass'n, 7 Cir., 248 F2

[9]The Fifth Circuit order was a writ of mandamus specifically directed to the district judge and clerk except as to that portion of the order which stated the order to be self-executing. The function of the district court in obeying a mandate of the Court of Appeals is, of course, ministerial. Bastian v. Erickson, 10 Cir., 114 F_2 338. The Mississippi district court did not *refuse* to obey the original mandate of transfer ordered by the court of appeals but affirmatively indicated his willingness to do so. His action in granting Hyde's motion to dismiss the case instead of effectuating the original mandate for transfer to Oklahoma was, as the Fifth Circuit specifically held, no more than error. The district court promptly obeyed the writ of mandamus.

804, 809; *cf. Huddleston v. Dwyer,* 10 Cir., 145 F. 311, 315. With all deference, we hold that the Fifth Circuit was powerless to "constitute" one of its orders a transfer and that the Oklahoma district court did not obtain jurisdiction by virtue of such order. It follows that the district court had no jurisdiction to issue its original restraining order nor to punish appellants for not complying with the order.

The injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with this opinion. Other contentions made on these appeals are either not properly before this court or are found to be without merit.

[*United States Court of Appeals, Tenth Circuit*]

JUDGMENT

Seventh Day, July Term, Wednesday, July 21st, 1965

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with the opinion of the court. Other contentions made on these appeals are either not properly before this court or are found to be without merit. It is further ordered that Hyde Construction Company, Inc., and Vardaman S. Dunn, appellants, have and recover of and from Koehring Company, appellee, their costs herein and have execution therefor.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 593. Decided January 17, 1966.

PER CURIAM.

On March 11, 1964, pursuant to a transfer order issued by the Court of Appeals for the Fifth Circuit, the United States District Court for the Northern District of Oklahoma entered an order temporarily restraining respondents from proceeding with trial of a case in the Mississippi state courts. When respondents, in disregard of the temporary restraining order, proceeded to trial in Mississippi, the District Court on March 14 found them in civil contempt.[1] Undeterred, respondents pressed the state court action to a conclusion and obtained a judgment against petitioner on April 8. But the District Court, on September 1, enjoined respondents from seeking to enforce the Mississippi judgment, required them to compensate petitioner for reasonable expenses in connection with the contempt proceeding, reserved decision as to whether they must also reimburse petitioner for expenses relating to the Mississippi litigation, and ordered the civil suit between the parties retried — this time in Oklahoma and in federal court.

Respondents appealed from this decree to the Court of Appeals for the Tenth Circuit which reversed, holding

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[1] Criminal contempt charges were also filed, but are not involved in the present petition.

that at the time the District Court had entered the original restraining order it was without jurisdiction since it had not yet received the case file from the transferor court. We are asked to review that determination. We grant the petition and reverse.

The District Court had assumed jurisdiction of the cause and entered its restraining order on March 11, five days before the papers in the case were transferred to it from Mississippi. It acted upon the basis of a certified copy of an order entered the previous day by the Court of Appeals for the Fifth Circuit. That order provided not only that the District Court for the Southern District of Mississippi had erred in failing to comply with an earlier appellate mandate to transfer the case, but also that "pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

Although a federal appellate court does not ordinarily itself transfer a case to another district, but remands to the District Court for that purpose,[2] the extraordinary action in this case was taken as a result of extraordinary circumstances. These included the fact that the Federal District Court in Mississippi had granted a motion to dismiss despite instructions from the Fifth Circuit to transfer the cause to Oklahoma,[3] and the further fact

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[2]Cf. *Platt* v. *Minnesota Mining Co.*, 376 U. S. 240 (under Rule 21(b) of the Federal Rules of Criminal Procedure).

[3]The Fifth Circuit suggests that the District Court's action was the result of misunderstanding over whether an answer had been filed and hence of its duty to grant a voluntary dismissal under Rule 41(a)(1) of the Federal Rules of Civil Procedure, rather than the result of unreadiness to respect appellate instructions.

that a duplicative action in the Mississippi state courts brought be respondent Hyde Construction Company was to commence, and did in fact commence, on March 11—one day after the Fifth Circuit's *instanter* transfer and the very day on which the Federal District Court in Oklahoma entered its order.

In the special circumstances of this case, we conclude that the District Court in Oklahoma had acquired jurisdiction on March 11 in accordance with the Fifth Circuit's order for *instanter* transfer and that the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground. We do not read 28 U. S. C. § 1404(a), providing that "a district court may transfer any civil action," as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order.[4]

Accordingly, we grant the petition, reverse the judgment, and remand to the District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions.[5]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

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[4] *Drabik* v. *Murphy*, 246 F. 2d 408 (C. A. 2d Cir.), is not authority for the proposition that the transferee court fails to acquire jurisdiction until papers are received from the transferor court. On the contrary, *Drabik* suggests that the transferor court may lose jurisdiction before that event.

[5] This reservation was made in the opinion of the Fifth Circuit.

I think, as shown by the record and the carefully prepared opinions of the able judges in both the Fifth and the Tenth Circuits, that the circumstances of this case are both too complex and obscure, and the issues which concern among other things the relationship between state and federal courts and the transfer of cases between federal courts are all too important to be treated in the cursory manner the Court does here. This Court's reversal of the judgment below, without giving respondents any opportunity for oral argument to support the thoroughly considered opinion and holding of the Tenth Circuit, seems more extraordinary to me than what the Court's *per curiam* opinion refers to as the "extraordinary circumstances" in the courts below. I dissent from that course of action taken by this Court.

APPENDIX G

IN THE
SUPREME COURT OF THE UNITED STATES

KOEHRING COMPANY, *Petitioner,* vs. HYDE CONSTRUCTION COMPANY, INC., ET AL., *Respondents.*	No. 593

RESPONDENTS' PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, respectfully petition the Court for rehearing of the decision and judgment in this cause and move the Court to amend the order remanding the case to the District Court for the Northern District of Oklahoma, to the end that the case may be remanded to the Court of Appeals for the Tenth Circuit for completion by that Court of its appellate review processes in the light of this Court's decision and judgment, and for grounds state the following:

1.

The only issue decided by the Court of Appeals was the transfer-jurisdictional issue, and this single threshold issue was the sole issue involved in the question presented to and decided by this Court on the writ of certiorari.

2.

Several additional points were specified, briefed and argued in the Court of Appeals, presenting serious issues

vitally affecting or dispositive of the case under review. Such issues were not reached or decided by the Court of Appeals, but were pretermitted by that Court in view of its ruling on the threshold jurisdictional decision.

3.

The Court of Appeals has not completed its appellate function of reviewing the judgment of the District Court on the basis of the record and the points specified, briefed and argued before that Court, and the review process cannot be completed if the Court of Appeals is by-passed by remanding the case to the District Court, except upon a subsequent appeal attended by unnecessary expense and delay.

WHEREFORE, Respondents respectfully pray that they be afforded a re-hearing for the purpose of presenting the grounds outlined above, and Respondents respectfully move the Court to amend its order or mandate to the extent of directing that the cause be remanded to the Court of Appeals for the Tenth Circuit for further proceedings and appellate review in that Court, and in support hereof Respondents submit the sub-joined brief.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 593 — October Term, 1965

Koehring Company,

Petitioner,

v.

Hyde Construction Company, Inc., et al

The petition for rehearing and motion to amend order of remand are denied.

March 7, 1966

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19819

KOEHRING COMPANY, ET AL.,
Appellants,

versus

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 19, 1963.)

Before CAMERON, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns the transfer of a cause to another district, under 28 U.S.C.A. 1404(a).

Hyde Construction Company, a Mississippi company, brought suit in a federal district court in Mississippi against Koehring Company, a Wisconsin corporation, and C. S. Johnson Company, a division of Koehring. Hyde alleged that Koehring agreed to construct a concrete cooling and mixing plant at the job site of a spillway at Keystone Dam on the Arkansas River in Oklahoma, and that the plant, as built, did not meet

the minimum operational standards agreed on in the contract between the parties. Koehring moved to dismiss on the ground that the court lacked jurisdiction since it was not "doing business" in Mississippi within the meaning of that state's statutes. Alternatively, it asked the district judge to transfer the cause to the Northern District of Oklahoma, where the alleged breach of contract took place and where its own action against the plaintiff was then pending. The trial judge denied both motions.

We do not reach the jurisdictional question for we hold that the case should be transferred under 28 U.S.C.A. 1404(a) to the Northern District of Oklahoma.

I.

Section 1404(a), Title 28 U.S.C.A., states the criteria to be considered in a motion for change of venue:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

These criteria have been spelled out in *Gulf Oil Corp. v. Gilbert,* 1947, 330 U. S. 501, 67 S.Ct. 839, 91 L. Ed. 1055. In that case the Supreme Court said:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . ."

Advantage and convenience to the litigants themselves are not the only important considerations, however. The Supreme Court went on to point out that

> "factors of public interest also have place in applying the doctrine. Administrative difficulties follow for court when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not too be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, though, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

Many of the elements mentioned in *Gulf Oil* as important are present here. The concrete cooling and mixing plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma; if, in view of the complexity of its operation, an on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or near the plant site, and the records of the U. S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa. Moreover, the docket in the Southern District of Mississippi is extremely congested, while that of the federal district court in the Northern District of Oklahoma is relatively current. Thus, every factor points to Oklahoma as the most logical forum for this action,

whereas the only connection which Mississippi has with this case is that one party to this suit resides there.

This case is similar to *Chicago, Rock Island & Pacific Railroad Co. v. Igoe,* 7 Cir. 1955, 220 F.2d 299. There the court pointed out that if "convenience of the parties" were the sole criterion, the refusal of the trial judge to transfer under Section 1404(a) could be sustained, since the plaintiff did in fact live in the district where suit was brought. There were, however, other statutory criteria to be considered. The Court stated:

> "As to the second test, 'convenience of witnesses,' it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from DesMoines, the two cities where the trial might be held. . . . There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago."

The Seventh Circuit then went on to discuss the "interest of justice," which it felt should be given paramount consideration: "In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred." The Court concluded that in these circumstances it was warranted in ordering the cause transferred to the proper forum. The same factors obtain here, and we have reached the same conclusion.

II.

The Supreme Court in the recent case of *Goldlawr, Inc. v. Heiman,* 1962, 369 U.S. 463, 82 S.Ct. 913, 8 L. Ed. 2d 39 has held that a court may transfer an action under 28 U.S.C.A. 1406(a) even though it lacks jurisdiction over the person. That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Construing this statute, the Supreme Court stated:

> "The language of §1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years — that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of §1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized at 'time-consuming and justice-defeating technicalities.' It would be least

> partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired."

The same considerations of convenience and procedural reform which prompted the enactment of Section 1406(a) apply to Section 1404(a), and there is no basis for distinguishing between them insofar as the rule enunciated in *Goldlawr* is concerned. See 1 Moore, Federal Practice para. o.146[5] at 1097 (2d Ed. 1951); 61 Mich. L. Rev. 393 (1962); 1963 Duke L. J. 168. Thus, whether or not the trial court below had personal jurisdiction over the defendant, for "the convenience of parties and witnesses" and "in the interest of justice" the cause should be transferred to Oklahoma.

The cause is REMANDED with instructions that it be transferred to the Northern District of Oklahoma.

APPENDIX J

[U. S. Court of Appeals, FILED, Mar. 6, 1964, Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY, — Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.

and

HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, — Respondents

NO. 19819

KOEHRING COMPANY, ET AL., — Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., — Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."

On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P, 41(a)(1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a) (b) (c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.

and

HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order restraining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order to transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the

District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P.41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a) (b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a) (1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and orders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute

the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown

JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE
March 10, 1964

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1256

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

RESPONSE TO QUESTIONS PRESENTED

We do not agree that the questions as presented by Petitioner for review are expressed accurately in the "terms and circumstances of the case" as required by Rule 23.

I.

The statement of the first question erroneously assumes that there were no further proceedings in the District Court of Oklahoma after remand of the case to that Court as a result of this Court's decision on the "instanter transfer" jurisdictional point; when, in point of fact, the case went back to the District Court as directed and the present appeal was later perfected from a new order of the District Court refusing to sustain a motion to dissolve an injunction.*

II.

The statement of the second question is so deficient in its omission of the terms and circumstances of the case as to be quite misleading. The question is not simply "does 28 U.S.C. § 2283 prohibit the federal court from temporarily restraining the plaintiff from proceeding in the state court suit." Thus overly abbreviated, the question omits several pertinent and, we submit, controlling circumstances as noted below.

(1) The case involves only a proceeding in *civil* contempt solely for the benefit of a private litigant, and the question, as stated, fails to cast the issue in a context involving exclusively the existence or non-existence of private rights to remedial relief. The question, as stated, thus fails in terms to separate the "power" of the Court itself from the "right" of a litigant to benefit from the exercise of the power when events prove that the injunctive order was erroneous and never should have issued.

---

*Jurisdiction was based on 28 *U.S.C.*, § 1292 (a)(1). Koehring's motion to dismiss the appeal was overruled and this Court declined to review the decision by denying certiorari on November 14, 1966. See *Koehring Company* v. *Hyde Construction Company*, 385 U.S. 949, 87 S.Ct. 323.

(2) The State Court acted only to the extent of entering a money decree for damages for a breach of contract and did not seek to interfere with a *res*, if any, under control of a Federal Court.

(3) The question leaves out of view the fact that the Koehring Company chose to submit its federal question, as to the effect of the restraining order, to the Supreme Court of Mississippi, and the question was decided in that appellate forum in favor of the jurisdiction of the State Court to proceed, which decision became final on Koehring's election not to seek certiorari review by the Supreme Court of the United States. When the case reached the State Supreme Court on Koehring's appeal, there was no restraining order in effect but, on the contrary, the order of the Oklahoma Federal District Court expressly authorized the parties to participate in the presentation to the State Supreme Court (R. 163, Appx. B).

Actually, Koehring made four elections to reject the Federal forum while it sought the favorable action of the State Courts. *First,* it moved to dismiss the Federal action for want of jurisdiction and sought venue transfer only in the alternative. *Second,* it entered its general appearance in the State Court and elected not to remove the State Court action to the Federal Court, although it was fully removable. *Third,* it initiated and fully participated in the presentation of all issues of every description to the Supreme Court of the State at a time long after the restraining order had expired and after securing an order from the Oklahoma District Court expressly permitting the parties to participate in the appeal to that Court. *Fourth,* after failing to obtain a *full* reversal in the Supreme Court of Mississippi, it elected not to seek review by the Supreme Court of the United States of the federal question adversely decided and now re-asserted in this collateral attack.

(4) The question leaves out of view the fact that the sanctions in question involve a second violation of 28 U.S.C. 2283, in that such take the novel form of an injunction against the State Court's further proceedings to enforce its own judgment, in the production of which all parties fully participated and were fully heard, even to the extent that while neither was wholly successful, each was partially so.*

OTHER QUESTIONS RESERVED

Other questions appeared in the case which were expressly or by necessary implication decided adversely to Respondent. A favorable decision on any one of these would have produced the same end result as that achieved on consideration of the other aspects of this civil case. Since these questions would not be reached in this Court if the application for the writ is denied their existence is mentioned only to avoid any possible waiver argument in the event that this Court should elect to review the decision of the Tenth Circuit.

MATERIAL SUBMITTED IN APPENDIX

Respondent attaches an Appendix containing the following pertinent documents submitted for consideration:

A. Order of Chancery Court dated March 10, 1964, directing the parties to proceed with the trial on March 11, 1964.

B. Injunction issued by the Oklahoma District Court against enforcement of Decree and for re-trial, but allowing all parties to participate on Koehring's appeal to the Supreme Court of Mississippi.

C. Opinions of the Supreme Court of Mississippi, reported in 178 So.2d 838 and 182 So.2d 580.

---

*While Hyde obtained a money judgment, Koehring was successful in reducing the award on appeal by $54,889.47 by the elimination of one major item of alleged damages.

D. Judgment of Supreme Court of Mississippi, dated February 7, 1966.

E. Motion of Hyde Construction Company filed in the Oklahoma District Court, styled "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause". (Without exhibits).

F. Opinion of the Court of Appeals for the Tenth Circuit on Hyde's appeal from the order denying the amended and supplemental motion. (388 F.2d 501).

G. Excerpt from brief of Respondent on Petition of Koehring (No. 567) for certiorari review of order overruling motion to dismiss appeal. (Certiorari denied 385 U.S. 949, 87 S.Ct. 323).

RESPONSE TO STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete and fails to place the controlling circumstances before the Court. We take the following statement verbatim from the factual summary as contained in the opinion of the Court of Appeals: *

> "This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

*See 388 F.2d 501 for report of this case.

"Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Oklahoma. Hyde contracted with Koehring for the design and installment by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

"On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U.S.C. § 1292(b).

"The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F.2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964, and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

"On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

"The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial. (See Appx. A).

"On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's attorneys, and the state

court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

"On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

"On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision

of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

"On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceeding in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 857.

"On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further procedings in the Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966. See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

"After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is

disposed of by an opinion filed contemporaneously with the opinion in this case.

"We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U.S.C., § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

"We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue—one in state court and one in federal court. Ordinarily, one trial of a controversy is enough."

The above statement fairly presents the general background and demonstrates that the Koehring Company provoked the erroneous issuance of an order to interrupt proceedings in a State Court of competent jurisdiction and now seeks not to vindicate the authority of the District Court but to obtain a private advantage from the error which it provoked in the first instance, responding to which the Court of Appeals said in concluding its opinion* [All footnotes by Court]:

"The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the effi-

*See also 388 F.2d at 510-511.

cacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties—Koehring and Hyde—and identity of subject matter—jurisdiction of the Mississippi court to proceed. The principles of res judicata apply to questions of jurisdiction.[16]

"Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction

15. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838, 842-850.

16. American Surety Co. v. Baldwin, 287 U.S. 156, 166.

17. See Donovan v. City of Dallas, 377 U.S. 408, 412.

18. Hart and Wechsler, The Federal Courts and The Federal System, 1057.

by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

"The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

"To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such rem-

19. Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F.2d 643, 647, reversed on other grounds 382 U.S. 362.

20. See Pan American World Airways, Inc. v. Flight Engineers' International Association, 2 Cir., 306 F.2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F.2d 931.

21. Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F.2d 727.

edy 'falls with an injunction which events prove was erroneously issued.'[22] Accordingly, the adjudication for civil contempt and the penalty imposed therefor cannot stand."

RESPONSE TO PETITIONER'S STATED REASONS

I.

There Is No Conflict with a Prior Decision of This Court in This Case.

Koehring's reference is to the decision of this Court in *Koehring Company* v. *Hyde Construction Company*, (1966) 382 U.S. 362, 86 S.Ct. 522, 15 L.Ed.2d 416, which held that a Court of Appeals may confer transfer jurisdiction upon a transferee District Court by a self-executing instanter transfer order, thereby reversing a contrary decision of the Tenth Circuit in *Hyde Construction Company* v. *Koehring Company*, (C.A. 10, 1965) 348 F.2d 643.

This "conflict" contention is the same point presented to the Tenth Circuit on Koehring's motion to dismiss the appeal in the present case. The motion was overruled and this Court denied Koehring's petition for certiorari. See *Koehring Company* v. *Hyde Construction Company*, (Nov. 1966) 385 U.S. 949, 87 S.Ct. 323. In response to that petition, it was pointed out that the one and only question presented, and hence the only question decided, was whether a Court of Appeals had the authority to enter an effective self-executing order for instanter transfer of a pending case from one district to another. In reversing the Tenth Circuit, this Court held that the transferee court acquired transfer jurisdiction under such an order, but just as the Tenth Circuit reached no other issue on the first appeal, so it was that no other question was presented to or decided by this Court on certiorari review.

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22. United States v. United Mine Workers of America, 330 U.S. 258, 295.

This question was argued to the Court of Appeals both on the motion to dismiss and upon the presentation of the appeal on its merits, and that Court found no conflict with this Court's decision on the transfer point, and fully responded to the argument on the point, concluding: (1) that when the Tenth Circuit acted upon the threshold jurisdictional point on the former appeal, it "did not reach the other issues;" and (2) that the validity of the injunction, apart from the transfer objection, was not discussed or decided, either by the Tenth Circuit or by the Supreme Court.

In remanding the case to the District Court, this Court gave no reason for not remanding instead to the Court of Appeals, but it evidently honored the conclusion expressed in the Tenth Circuit's opinion under review that "Other contentions made on these appeals are either not properly before this Court or are found to be without merit." (348 F.2d at 649).

We do not quarrel with the two cases cited in Koehring's petition: *In re Potts,* 166 U.S. 263, 17 S.Ct. 520, and *Briggs* v. *Pennsylvania R. Co.,* 334 U.S. 304, 68 S.Ct. 1039. These cases simply announce the well settled rule that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. There is no deviation in the case at bar: The Tenth Circuit simply looked at the mandate, along with the question presented and decided, and noted that no part of the mandate decided or pre-empted consideration of the merits of the contentions relating to the validity of the restraining orders as this might affect the right of a private litigant to reap the benefits of sanctions in *civil* contempt. Cf. *Sprague* v. *Ticonic Nat. Bank,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1148; *Re Sanford Fork & Tool Company,* 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414; *Ex parte Union Steamboat Company,* 178 U.S. 317, 20 S.Ct. 904, 44 L.Ed. 1084; *Mutual Life Insurance*

Co. v. *Hill,* 183 U.S. 551, 24 S.Ct. 538, 48 L.Ed. 788; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785; *Hartford Life Ins. Co.* v. *Blincoe,* 255 U.S. 129, 41 S.Ct. 276, 65 L.Ed. 549; and *Ballard* v. *United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 832.

These and other cases were discussed in our response to Koehring's petition for certiorari review of the order overruling its motion to dismiss this appeal. An excerpt from Respondent's brief on the former petition is attached as Appendix G.

II.

The Decision Below Does Not Conflict with Prior Decisions of Other Courts of Appeal or of This Court.

Koehring's reference is to a restraining order that was issued by the Fifth Circuit ex parte on March 6, 1964, and promptly dissolved on motion four days later on March 10, 1964.* Since the restraining order was issued ex parte and then promptly vacated on motion, it is very difficult to follow petitioner's argument that this in some way established a precedent for requiring the upholding of a restraining order thereafter issued by the District Court in Oklahoma.

It is most difficult to see where any conflict can be carved out of the fact that the Fifth Circuit, for its own reasons, issued and then promptly vacated a restraining order, when the subsequent action by the District Court in Oklahoma did not purport to continue or otherwise deal, and in fact did not deal, with the Fifth Circuit's order, since such had been vacated by the Fifth Circuit before the case reached Oklahoma. The propriety of the Fifth Circuit's ex

*An earlier application for an injunction had been denied by the Fifth Circuit after a hearing.

parte order was never debated since its prompt vacation by that Court made any such question entirely moot.

Koehring next argues that the Tenth Circuit in deciding that the restraining order issued by the District Court in Oklahoma was erroneous, found that such Court was "powerless" to enter an order similar to that which had precedently been issued and then vacated by the Fifth Circuit. But such was not the finding at all. The finding was that the injunction was erroneously issued and, therefore, that the private litigant, Koehring Company, could not be advantaged merely by the exercise of that power. No such question was before the Fifth Circuit at any time and none such was passed upon, and hence there could not be a conflict in any area from any viewpoint.

Koehring cites *Prack* v. *Weissinger*, (C.A. 3) 276 F.2d 446, and *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, (C.A. 9) 316 F.2d 804. But these cases simply announced the general rule that "judges of co-ordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." (376 F.2d at 450).

As noted, there was no question put before the Fifth Circuit which can be equated with that which is the basis for the holding of the Tenth Circuit in the present case, viz: that a private litigant may not be advantaged by the exercise of a judicial power which the litigant provoked and which events have shown to have been erroneous.

Koehring cites *American Ins. Co.* v. *Lester*, (C.A. 4) as being in conflict, but that decision is clearly distinguishable. As stated by the Tenth Circuit in its opinion: [Footnote by the Court].

> ". . . The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number

of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. . . ."

Next Koehring cites *Moss* v. *Burkhart*, 220 F.Supp. 149, from a three judge court dealing with reapportionment. There is no similarity of circumstance. The Court there dealt with federal questions in an area largely pre-empted by the federal courts.

Koehring argues that Respondent having first filed this breach of contract action in the Federal Court, it should not be allowed to "circumvent that jurisdiction by provoking a federal-state conflict." But what Petitioner studiously avoids mentioning is that Koehring (1)* promptly challenged the jurisdiction of the Federal Court, seeking venue transfer only in the alternative; (2) elected not to remove the State Court action shortly thereafter filed, although such was clearly removable to the Federal Court; (3) entered its appearance in the State Court and fully participated in the trial and in the appeal and sought relief affirmatively in those Courts; and (4) having lost some part of its case in the State Court of last resort, elected not to seek certiorari review in the Supreme Court

12. See IA, Moore Federal Practice, ¶ 0.220, p. 2604.

*See Order of March 10, 1964 (Appx. A). This was the order resulting from a hearing initiated by Koehring Company on its submission of the "stay" question to the State Court.

of the United States on the basis of the federal question now sought to be relitigated.

Also not mentioned is the fact that at no time prior to final judgment did the State Court place itself in conflict by seeking to stay the trial of the case on its merits in the Federal Court. The State Court by its order directed the parties to proceed in that State Court, but it did not direct them not to proceed in any other court. Hence, there was no conflict until Koehring provoked the Federal District Court in Oklahoma to issue an order directing stoppage of the State Court trial then in progress. The only provocation of conflict was at the hands of Koehring, not at the hands of Respondent. To sanction this conduct by a litigant would be to foster, not avoid, federal-state conflicts.

Finally, we submit that the decision of the Tenth Circuit does not conflict with any prior decision of this Court in the *in rem* v. *in personam* area. The conclusions are entirely consistent with the decisions of this Court and, in fact, the law is so well settled against Koehring's contentions by this and other courts as to leave no room for serious debate.

The judgment rendered by the Mississippi Court was a money judgment for damages for a breach of contract. Nothing in the form of a *res* or *thing* was possessed, impounded or acted upon by that Court.

Koehring's argument here was rejected by the Tenth Circuit in these words* [All footnotes by the Court]:

> "The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C., § 2283. That statute forbids a federal court to enjoin state

*See also 388 F.2d at 508-509.

court proceedings except when expressly authorized by Congress 'or where necessary in aid of jurisdiction, or to protect or effectuate its judgments.' Koehring says that the injunction is necessary to protect the federal jurisdiction.

"The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

"Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant 'does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required.'[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to juris-

5. See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U.S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67, 70.

6. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F.2d 89, 100, modified in non-pertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F.2d 582, 585.

7. See Mississippi Code Annotated (1956), § 2729.

8. Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955, 966.

diction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the 'in aid of its jurisdiction' exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

"Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order

9. See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67.

10. In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction. * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The

of the court below restraining the entire state action was not necessary and cannot be sustained.

"The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. . . ."

Koehring, strangely enough, cites *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077. This is indeed the landmark case in this area. In this case the plaintiff first filed suit for breach of contract in the Federal Court and sought an accounting. The case resulted in a mistrial. Subsequently, the plaintiff filed the same cause of action in the Chancery Court of Arkansas. The defendant sought an injunction against prosecution of the State Court suit. The Court of Appeals reversed a denial of the injunctive relief and remanded with directions that the injunction issue. The Supreme Court reversed.

Emphasis in this case centered around the concept of *in personam* actions versus *in rem* or *quasi in rem* actions, the latter terms being used only in the sense of actions "which deal either actually or potentially with specific property or objects."

The following are excerpts from the opinion in the cited case:

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jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

11. 28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

"It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached."

ALSO

"But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending."

ALSO

". . . The rank and authority of the courts (Federal and State) are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Quoting with approval from an Eighth Circuit decision, the Court referring to the power to enjoin, said:

". . . The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

The court referred to the duty of the Federal Court to proceed independently when *in personam* relief was requested, and as to the State Court's duty, said:

". . . it was, therefore, equally the duty of the state court to take the case and proceed to judgment. . . ."

In *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania ex rel. Schnader,* 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850, the finding of an absolute necessity of avoiding conflict as a condition precedent to interference with the normal procedures of a State Court was strongly emphasized, the Court saying:

". . . While it is often said that, of two courts having concurrent jurisdiction in rem, one first taking possession acquired exclusive jurisdiction, see Peck v. Jennes, supra, pages 624, 625 of 7 How., 12 L.Ed. 841; Wabash R. Co. v. Adelbert College, supra, page 54 of 208 U.S., 28 S.Ct. 182; Harkin v. Brundage, supra, page 43 of 276 U.S., 48 S.Ct. 268, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See Leadville Coal Co. v. McCreery, supra, page 477 of 141 U.S., 12 S.Ct. 28. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. Yonley v. Lavender, 21 Wall. 276, 22 L.Ed. 536,

Heidritter v. Elizabeth Oil-Cloth Co., 112 U.S. 294, 304, 5 S.Ct. 135, 281 L.Ed. 729; Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867. . . ."

In *Denver-Greeley Valley Water Users Assn.* v. *McNeil,* (C.A. 10th) 131 F.2d 67, the Court also emphasizes the positive requirement of a finding of necessity to support an injunction as an exception to the statute. The rule was expressed thusly:

> "The mere fact that the two suits relate to the same physical property does not justify a restraint of the second suit by the court first acquiring jurisdiction. Empire Trust Co. v. Brooks, 5 Cir., 232 Fed. 641; Harkin et al. v. Brundage et al., 276 U.S. 36, 48 S.Ct. 268, 72 L.Ed. 457. Furthermore, the necessity does not exist which would warrant injunctive relief where the subsequent action does not create a conflict between the courts over the possession or custody of the res."

In *Wells* v. *Helms,* (C.A. 10th) 105 F.2d 402, the court affirmed a case in which the District Judge had refused to proceed. It involved the question of the power of the Court to adjudicate the right of a litigant to share in an estate being administered in a State Court. No request for an injunction was involved, but in dealing with *in personam* jurisdiction allowing both courts to proceed independently without interference, the Court said:

> "An administrator appointed by a state court is an officer of that court and takes possession of the decedent's property in obedience to the orders of the court. His possession is the court's possession and cannot be disturbed by any other court. Byers v. McAuley, 149 U.S. 608, 615, 13 S.Ct. 906, 37 L.Ed. 867.
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> "However, a distributee of an estate, citizen of another state, may establish his right to a share in such estate, and enforce such adjudication against the

administrator personally or his sureties, or against any other person liable therefor, or *proceed in any way which does not disturb the actual possession of the property by the state court.* Byers v. McAuley, supra; Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 44, 30 S.Ct. 10, 54 L.Ed. 80; Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 619, 56 S.Ct. 600, 80 L.Ed. 920; Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 59 S.Ct. 275, 281, 83 L.Ed. 285." (Emphasis added).

III.

The Case Presents No New Important Questions Requiring Settlement by This Court.

Koehring at this point asks this Court to set guidelines as to the power of a Federal Court to enjoin State Court proceedings in cases "neither clearly *in rem* nor clearly *in personam.*"

Here again Petitioner seeks to capture the interest of this Court in considerations of the "power" of a Federal Court over State Court proceedings. And again we find it necessary to point out that no such question of "power", as such, is involved but only a question of the right of a private litigant to reap a financial advantage from the erroneous exercise of that power. More specifically, Petitioner would have the Court create a private right—one which did not precedently exist—by the sheer force of an erroneous injunctive order, issued on its request, which, as events proved, never should have issued.*

*As stated in *Deeds* v. *Gilmer*, 162 Va. 157, 174 S.E. 37, a citation taken from Koehring's brief in the court below:

"... But it is to be borne in mind that an injunction gives rise to no lien or new substantive right, and that it only protects existing rights and liens which are pleaded in the suit in which it is granted. If the violation of the injunction has not damaged any property or rights or prevented the enforcement of a lien which, under the pleadings and proof in the injunction cause, the complainant was legally entitled to have protected,

As to the plea for guidelines in the in rem and in personam aspects of litigation, the guidelines have been clearly drawn since the decision of this court in *Kline* v. *Burke Constr. Co.*, (1922) 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1007.

Application of settled principles to the circumstances in the case at bar fully support the decision below. By way of summary:

(1) Koehring, after electing not to remove the case, elected to present to the State Courts every facet of its contentions, both on the merits of the case and on jurisdictional issues, including the effect on the State Court judgment of the pre-existing restraining order issued by the District Court in Oklahoma.* Then, instead of seeking certiorari review of the federal questions now being re-asserted, it elected to attack the decision of the State Supreme Court collaterally under the form of a proceeding in civil contempt by seeking and obtaining from the Oklahoma District Court an order vacating the judgment and directing a re-trial of the case on its merits. It is settled, however, that its recourse in the circumstances was exclusively by petition to the United States Supreme Court for direct review of the decision of the State Court of

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preserved, or enforced by the injunction, he has not been damaged by its violation, and is not entitled to have remedial punishment imposed upon the violator. To state the last proposition in a different way—where, upon a hearing of the cause, it appears that the injunction should never have been granted to the person complaining of its violation, because, under pleadings and proof in the injunction cause, he was not entitled to have injunctive relief, he has not been injured or damaged by the violation thereof, and is not entitled to have remedial punishment imposed upon the violator; and in such cases the court will not impose upon the violator a remedial punishment. . . ." (174 S.E. at 79).

*See opinions of the Supreme Court of Mississippi reported in 178 So.2d 838 and 182 So.2d 580, attached as Appx. C to this brief.

last resort. See: *Treinies* v. *Sunshine Mining Company*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 1034; *Angel* v. *Bullington*, 330 U.S. 183, 67 S.Ct. 657; *Lavasek* v. *White*, (C.A. 10) 339 F.2d 861; *Dean Hill Country Club* v. *City of Knoxville*, (C.A. 6) 379 F.2d 321, and cases cited.* The State Supreme Court expressly decided that it had the jurisdiction and duty to proceed to final judgment and the doctrine of res judicata applies equally to jurisdictional questions expressly presented and decided. See *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244; *Treinies* v. *Sunshine Mining Company*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 1034; *Heiser* v. *Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970; *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429; *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552; and *Durfee* v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186.

Moreover, the prohibition of 28 U.S.C. 2283 applies to injunctions against enforcement proceeding on a State Court judgment as well as to other and precedent proceedings. This also is settled. See: *Hill* v. *Martin*, 296 U.S. 393, 56 S.Ct. 278, 70 L.Ed. 293. Also: *Central Nat. Bank of Boston* v. *Stevens*, 169 U.S. 432, 18 S.Ct. 402, 42 L.Ed. 807; *Mutual Reserve Fund Life Assn.* v. *Philps*, 190 U.S. 147, 23 S.Ct. 707, 47 L.Ed. 987. The judgment is entitled to be accorded full faith and credit. Article IV, Sec. I, *United States Constitution*, mandated upon every court of the United States by 28 U.S.C. 1738, as to which see: *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231. This means "not some but full credit." *Davis* v. *Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed.

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*See Also: *Parnacher* v. *Mount*, (C.A. 10) 207 F.2d 788, cer. den. 347 U.S. 917, 74 S.Ct. 515, 98 L.Ed. 1073, rehearing den. 347 U.S. 940, 74 S.Ct. 626, 98 L.Ed. 1089; *Dairy Distributors* v. *Western Conference of Teamsters*, (C.A. 10) 294 F.2d 348; *Frazier* v. *East Baton Rouge Parish School Bd.*, (C.A. 5) 363 F.2d 861; *Alleghany Corporation* v. *Kerby*, (C.A. 2) 340 F.2d 311, footnote No. 1.

26. And it matters not that a question of jurisdiction is involved if such was presented to and decided by the Court rendering the judgment. *American Surety Co.* v. *Baldwin*, supra; *Wayside Transportation Co.* v. *Marcell's Express, Inc.*, (C.A. 1) 284 F.2d 868.

(2) Another question presented to and decided by the Supreme Court of Mississippi on Koehring's appeal to that Court dealt with the in personam nature of the case in the light of the state statute dealing with chancery attachments. After reviewing the applicable cases from this Court and others, the Court concluded that: "It appeared, therefore, the Mississippi judgment is not affected by the Federal injunction and prior proceedings in the Federal Court." This conclusion was upon the decisional basis that the only subject matter dealt with by the Mississippi Court was in personam. See: 178 So.2d at 842-850, Appendix C. The question thus decided on Koehring's appeal does not call for a new guideline, since it is res judicata as between these private litigants in their private controversy, bearing again in mind that the present proceedings are civil and not criminal and that vindication of the authority of the District Court is in no way involved.

IV.

It Is Immaterial Whether This Case Will Govern or Have Any Effect on a Companion Criminal Contempt Case.

The criminal case referred to is the one involving Respondent's Mississippi Trial Court attorney. The judgment and ninety day jail sentence was reversed but the case was remanded, in the spirit of the similar action taken by this Court in *Donovan* v. *City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409, for further consideration

and action by the District Court. But that case is not now before this Court, since the Government did not seek certiorari review, and in the present posture of the case, the Appellant had nothing to appeal from. Since the issues in the two cases are quite different, we dispute the accuracy of Petitioner's statement that a decision in the present case will also govern the criminal case or that this Court should be concerned therewith on the civil record filed herein.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted

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March, 1968.

APPENDIX A

Order of Chancery Court Dated March 10, 1964, Directing the Parties to Proceed with the Trial on March 11, 1964.

In the Chancery Court of the First Judicial District of Hinds County, Mississippi.

Hyde Construction Company, Inc., Plaintiff v. Koehring Company, et al., Defendants; No. 60068.

Order Overruling Motion of Defendant for Postponement of Trial

Came on This Day to be heard the third application of defendant to stay the proceedings in this cause and the Court finding that this cause is fully at issue on its merits and has been set for trial since 2:00 o'clock P.M. on Monday, March 9, 1964 but has been delayed from day to day pending various maneuvers of defendant in the Federal Court, and the Court further finding that the parties have been standing by for trial at great inconvenience and expense and that a further delay would amount to extreme hardship and injustice, and that there is no further cause for delay and that this cause should be tried forthwith;

It Is Ordered and Adjudged that the plaintiff's* last application be and the same is hereby denied and the parties are ordered and directed to proceed with the trial of this cause commencing at 2:00 o'clock P.M. on Wednesday, March 11, 1964.

So Ordered on this the 10th day of March, 1964.

J. C. Stennett, Chancellor

Filed March 10, 1964, Charles A. Scott, Chancery Clerk (illegible).

*Should read "defendant's"

APPENDIX B

Injunction Issued by the Oklahoma District Court Against Enforcement of Decree and for Re-Trial but Allowing All Parties to Participate on Koehring's Appeal to the Supreme Court of Mississippi.

Judgment And Order

[5911]

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they thereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,-009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed September 1, 1964.

APPENDIX C

Opinions of the Supreme Court of Mississippi, Reported in 178 So.2d 838 and 182 So.2d 580.

KOEHRING COMPANY

v.

HYDE CONSTRUCTION COMPANY, INC.

No. 43572.

Supreme Court of Mississippi.

Feb. 7, 1966.

182 So.2d 580

Butler, Snow, O'Mara, Stevens & Canada, Roger C. Landrum, Jackson, John F. Friedl, W. A. Denny, Milwaukee, Wis., for appellant.

Cox, Dunn & Clark, Barnett, Montgomery, McClintock & Cunningham, Jackson, for appellee.

SMITH, Justice.

Following the affirmance of this case, as reported in 178 So.2d 838 (Miss. 1965), both parties filed suggestions of error, with supporting briefs. Replies from each side, also supported by briefs, were filed in response to a request of this Court.

We have now reviewed the entire case in the light of the excellent briefs submitted by both sides and have concluded that we should adhere to our former opinion and that both suggestions of error should be overruled.

During the pendency of the suggestions of error, the United States Supreme Court, in an opinion delivered January 17, 1966, in 86 S.Ct. 522, styled Koehring Co. v. Hyde Construction Co., Inc., reversed the decision of the

United States Circuit Court of Appeals, 10th Circuit, reported as Hyde Construction Company v. Koehring Company, 348 F.2d 643 (10th Cir. 1965), and held that the United States District Court for the Northern District of Oklahoma had acquired jurisdiction in that case on March 11, 1964.

As we read the January 17, 1966, decision of the United States Supreme Court, referred to above, it does not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree affirmed by this Court.

The suggestions of error filed by appellant and by appellee are overruled.

Suggestions of error overruled.

All Justices concur.

ON MOTION TO CORRECT JUDGMENT

RODGERS, Justice.

The appellee, Hyde Construction Company, filed a motion to correct the judgment heretofore entered in the above-styled cause on the following ground: The amount set out in the judgment of the Court in favor of appellee is excessive since the original amount of $468,450.08 included not only $51,733.71 for "winter protection", plus $3,155.76, interest to April 1, 1963, but also $3,163.72 interest from April 1, 1963, to April 8, 1964. In the original judgment of this Court, we subtracted from the original amount allowed by the chancellor in the trial court, the sum of $54,889.47, the total for winter protection and interest to April 1, 1963. However, we did not subtract the interest which was included in the judgment, in the sum of $3,163.72 interest from April 1, 1963, to April 8, 1964.

[1, 2] We are of the opinion that the judgment of this Court should be corrected by subtracting from the total amount allowed by the chancellor, $464,450.08—the total sum of the "winter protection" $51,733.71—plus the two items of interest on the winter protection, making a total sum of $58,053.19, leaving a balance of $406,396.89 due by the appellant Koehring Company to the appellee Hyde Construction Company, Inc. The judgment should allow six percent interest from and after April 8, 1964, on the balance due to the appellee.

[3] It is next contended by the appellee that the judgment of the Court should be amended to include the surety on appellant's supersedeas bond, the Fidelity and Deposit Company of Maryland. We agree that the judgment should be amended so as to include the judgment against the Fidelity and Deposit Company of Maryland, surety on appellant's supersedeas bond, so as to make appellant and the surety jointly liable for the judgment in favor of Hyde Construction Company against Koehring Company. Mississippi Code Ann. § 1973 (1956).

[4] The appellee contends that the judgment in this case should be amended to apportion the cost of appeal between appellant and appellee because this Court affirmed eighty-seven percent of the amount allowed by the judgment and decree of the chancery court, and appellee should not be required to pay all of the cost of appeal. We also agree with this argument, and the judgment is amended so as to charge fifty percent of the cost of appeal to appellant Koehring Company and fifty percent of the cost of appeal to Hyde Construction Company. Miss.Code Ann. § 1971 (1956); Illinois Cent. R.R. Co. v. George, 241 Miss. 233, 130 So.2d 260 (1961); Shipman v. Lovelace, 215 Miss. 141, 60 So.2d 559 (1952); Barry v. Wingfield, 126 So. 842 (Miss.1930).

[5] Finally, it is claimed by appellee Hyde Construction Company, Inc. that it should be allowed five percent damages on the balance of $406,396.89, due appellee, and that the order of the Court should be amended so as to allow such damages. We are of the opinion that this contention is not well-taken. The judgment should not allow damages of five percent. See Miss. Code Ann. § 1971 (1956); Illinois Cent. R.R. Co. v. George, supra; Boyd v. Applewhite, 123 Miss. 185, 85 So. 87 (1920).

The Clerk of the Supreme Court is hereby directed to amend the judgment of this Court entered in Minute Book BN at page 423, dated October 8, 1965, so as to comply with the amendments directed to be made, as above set out.

So ordered.

All Justices concur.

KOEHRING COMPANY

v.

HYDE CONSTRUCTION COMPANY, INC.

No. 43572.

Supreme Court of Mississippi.

Oct. 4, 1965.

178 So.2d 838

Butler, Snow, O'Mara, Stevens & Canada, Roger C. Landrum, Jackson, John F. Friedl, W. A. Denny, Milwaukee, Wis., for appellant.

Cox, Dunn & Clark, Jackson, for appellee.

RODGERS, Justice:

This case grew out of the following facts and circumstances: On November 18, 1959, a contract was awarded

to Hyde Construction Company, Inc. in the amount of $16,173,876.86 for the construction of a large concrete spillway, Keystone Dam, Arkansas River, in the State of Oklahoma. The specification of the United States Corps of Engineers, as incorporated in the contract, required that the contractor erect a suitable concrete plant of sufficient capacity to satisfactorily batch, mix and discharge two hundred cubic yards of concrete per hour, and sixteen hundred cubic yards of concrete in any eight-hour shift. The specifications also required that the concrete be placed in the facility at a certain temperature. The Hyde Construction Co., Inc. (hereinafter called Hyde) went about securing a plant and equipment that would produce a concrete mix required by the contract, and entered into negotiations with the Koehring Company (C. S. Johnson Company, Division, hereinafter called Koehring) for the purchase of a plant to manufacture the required mix.

Koehring proposed the installation of a cooling and heating facility, which was to operate on a vacuum principle. Hyde was experienced in the operation of a concrete mixing plant of similar make and design which had been previously sold and offered by Koehring, but had had no experience with the proposed vacuum cooling system or equipment necessary to control the temperature of the mix proposed to be manufactured by Koehring. A contract was negotiated between the appellant and appellee on February 5, 1960, in which Koehring guaranteed that its cooling plant would operate to the satisfaction of Hyde, but it is charged that the plant failed to operate as guaranteed and as a result of the failure of the plant and system to operate and produce the required cement mix from the date of installation, the progress of the work on the Keystone Dam Project was thereby greatly delayed, resulting in many "shut-downs" and periods of loss

of time and labor efficiency, resulting in great damage to Hyde in the sum of $500,000.

On August 30, 1961, in Civil Action No. 3175, Hyde exhibited its complaint in the Federal Court at Jackson, Mississippi, wherein it sought a money judgment against Koehring for the breach of the contract and warranty set out in the sale contract for the concrete mixing and cooling plant. This bill of complaint also made two companies defendants by way of attachment. Dalrymple Equipment Company was named attachment defendant in the State and Federal Courts. It was alleged that each of the attached defendants knew of other residents having effects of the non-resident defendant Koehring and others who were indebted to it. Attachment was requested under the method set out in Mississippi Code Annotated sections 2729 through 2734, inclusive (1956).. The complaint also charged that there was diversity of citizenship existing between the complainant on the one hand and Koehring (C.S. Johnson Division) on the other. The complaint asks that the court enter a decree in favor of the complainant, jointly and severally, against the non-resident defendant in the full sum of $500,000, with legal interest and the cost of court, and that the funds and effects in the hands of the attached defendants be condemned for the satisfaction in whole or in part of a money decree. It requests that judgment be entered as provided by law in such cases against the attached defendants upon a recovery of judgment. The bill of complaint alleged that Koehring was a foreign corporation, doing business in Mississippi, without having qualified and appointed an agent for process, thereby calling into play the statute which designated the Secretary of State as agent for process. Koehring filed no answer in the Federal action, but instead filed a special appearance in the form of a motion to dismiss for want of jurisdiction.

Koehring's motion to dismiss the Federal action for lack of jurisdiction also included a request in the alternative, that the court transfer the case to the Federal District Court of Oklahoma under section 1404(a), Title 28 U.S.C.A. This motion was overruled; whereupon, Koehring appealed to the Court of Appeals of the Fifth Circuit. Thereafter, on September 27, 1961, while the above-mentioned suit was pending in the Federal District Court at Jackson, Hyde filed a suit in the State Chancery Court of the First Judicial District of Hinds County, Mississippi, setting out an identical cause of action theretofore filed by Hyde in the Federal Court.

In the State Chancery Court suit, Hyde also invoked a non-resident or attachment statute of Mississippi and Dalrymple Equipment Company again was made a resident attachment-defendant. The State Chancery Court action remained relatively dormant while proceedings were had on Koehring's appeal from the decision of the Federal Court in Mississippi.

While the appeal in the Fifth Circuit was pending in the Federal Court suit, Koehring filed its answer in the State court on January 30, 1963, thereby entering its appearance in the Chancery Court proceedings. In this answer, Koehring pleaded the pendency of the prior Federal court action, and alleged that the issue in the former Federal Court suit and the issue set out in the State Chancery Court suit was the same, and that the prior Federal Court suit was brought as a *quasi in rem* proceeding. Koehring requested in its answer that the Chancery Court suit should be dismissed or stayed, pending the disposition of the earlier filed Federal Court action. However, no plea in abatement was filed and no proof of a restraining order was made prior to the entry of the final decree in the

State Chancery Court. On September 19, 1963, the Court of Appeals for the Fifth Circuit, 324 F.2d 295, rendered an opinion in the Federal Court proceeding which pretermitted the jurisdictional question, but reversed the lower U. S. Court directing that the Federal Court suit be transferred to the First District for the Northern District of Oklahoma.

After the U. S. Fifth Circuit Court had rendered its opinion, Hyde requested that the State Chancery Court suit be set for trial. Koehring requested that the state court stay or dismiss the proceeding because of the prior proceedings filed in the Federal Court but this motion was overruled. The Chancery Court then set the state case for trial to be held Monday, March 9, 1964. During this time, Hyde had filed a petition for rehearing in the U. S. Fifth Circuit, and Koehring had filed in the same court a motion for an injunction to restrain Hyde from proceeding to trial in the State Chancery Court suit. On January 27, 1964, this motion was overruled without prejudice to Hyde's right to apply to the Oklahoma Federal District Court, to which the case was remanded, for a transfer back. February 5, 1964, the Fifth Circuit denied Hyde's petition for a rehearing. On February 14, 1964, the U. S. Fifth Circuit issued its mandate reversing the District Court's previous judgment of September 19, 1963, which *inter alia* "ordered and adjudged" that the case "be and it hereby is remanded to the * * * Court for the Mississippi Southern District with instructions that it be transferred to the Northern District of Oklahoma. * * *" Thereupon, Hyde attempted to dismiss his action in the Mississippi Federal Court. After the District Court entered an order of dismissal on February 24, 1964, Koehring petitioned the U. S. Fifth Circuit Court for a writ of mandamus to have the dismissal order vacated and the

action immediately transferred to the Oklahoma Federal District Court.

The hearing on the petition for a writ of mandamus in the U. S. Fifth Circuit (by order dated March 6, 1964) temporarily enjoined Hyde from proceeding further in the Mississippi Chancery Court action. On March 10, 1964, the Fifth Circuit Court of Appeals held that the Federal District Court in Jackson had committed error in allowing Hyde to dismiss the Federal Court suit. Thereupon, the Fifth Circuit Court directed a vacation of the order of dismissal which had been entered by the Federal District Court in Jackson on February 24, 1964, and ordered the Clerk of the Federal Court in Jackson to immediately transfer the record in that case to the Clerk of the Federal Court of the Northern District of Oklahoma. It further ordered that pending the physical filing of that order in the Oklahoma Court, the Fifth Circuit's order would "constitute a transfer to enable the parties to present the matter to the District Court in Oklahoma.". The U. S. Fifth Circuit Court found that the immediate transfer to Oklahoma would protect and effectuate the order of the Fifth Circuit Court, and thereupon vacated the temporary injunction restraining Hyde from proceeding further in the Chancery Court action. The cause thus transferred to the Oklahoma Federal District Court became Civil Action No. 5911 on the docket of that court.

Although, as previously stated, the Mississippi Chancery Court suit was set for trial on March 9, 1964, it was continued for hearing until March 11, 1964. At a hearing, participated in by counsel for both Hyde and Koehring on March 11, 1964, the Federal District Court in Oklahoma, prior to 2 P.M. and prior to the commencement of the trial in the State Chancery Court suit, issued a tempo-

rary restraining order against Hyde, its attorneys and those in concert with them, from proceeding with the trial in the State Chancery Court. Notice of a temporary restraining order was transmitted to Jackson *by telephone* and announced in open court at the outset of the trial, and the attorneys for Koehring requested that Koehring be granted permission to refrain from proceeding in the Chancery Court suit. Nevertheless, the State Court directed that the case proceed to trial as previously ordered.

The Chancery Court proceeded with the trial of this cause until it was completed on March 25, 1964. On April 7, 1964, the Chancery Court rendered an opinion in favor of Hyde, and on April 8, 1964, entered a final decree in favor of Hyde, against Koehring, awarding a money-judgment in the sum of $464,450.08. Thereafter, Koehring filed a petition in the State Chancery Court asking for a rehearing, and asking the court to vacate its former decree. This petition set forth, among other things, that Hyde should not have been permitted to have proceeded in the Chancery Court suit after *notice* of the various restraining orders issued by the Oklahoma Federal District Court. A response was filed by Hyde to this petition, and the petition was overruled. Koehring perfected the present appeal with supersedeas from the money-judgment of April 8, 1964. Thereafter, on September 1, 1964, the Oklahoma Federal District Court rendered an opinion, ordering and adjudging in that Court (in Civil Action No. 5911) that sanctions be imposed against Hyde and its attorneys for contempt of court.

I

STATE COURT JURISDICTION

The question then to be determined in the outset is, whether or not the Federal Court, having first acquired

jurisdiction of the subject-matter and the parties, had *exclusive* jurisdiction, so that the Chancery Court of Mississippi had no jurisdiction to try the case filed in the State Court.

The conflict in jurisdictions of the Federal and State Courts under our system of government had given rise to considerable controversy in the various opinions of courts, both of the states and of the Federal jurisdictions. It is pointed out in 21 C.J.S. Courts § 522 (1940) at p. 791 that:

> "The courts of the United States and the courts of the various states are independent of each other, except as judgments of state courts are subject to review by the federal supreme court, as indicated in the C.J.S. title Federal Courts §§ 238-271 * * *. So ordinarily the pendency of a suit in a federal court is not a bar to a suit in a state court involving the same controversy, and vice versa. However, the two courts are not foreign to each other; they form one system of jurisprudence, which constitutes the law of the land, and should be considered as courts of the same country, having jurisdiction partly different and partly concurrent, and as a matter of comity one of such courts will not ordinarily determine a controversy of which another of such courts has previously obtained jurisdiction. * * *"

[1-3] As a general rule, the grant of jurisdiction to the Federal Courts does not of itself imply that the jurisdiction is to be exclusive. So, where a right of action, given by a statute of the United States, is an advancement of the common-law right, existing independently of the relation of Congress in pursuance of the powers delegated by the Constitution of the United States, the concurrent jurisdiction of the State Court is not taken away. Also, where the State Courts have long enjoyed jurisdiction over the subject-matter of an action, jurisdic-

tion is not withdrawn by federal statute unless such an intention is distinctly manifested.

The author sets out in the textbook, Moore's Federal Practice, 1A, 2d Edition, section 0.221 (1965) at pages 2605, 2606, the following:

> "Where the federal and state courts have concurrent jurisdiction, as, for example, in diversity and general federal question cases, actions *in personam* may proceed concurrently. In other words, as stated in some of the cases, 'the rule * * * has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.'"

Kline v. Burke Construction Co., 260 U.S. 226, 230, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077 (1922); Equitable Life Assur. Soc. of the U. S. v. Wert, 102 F.2d 10 (C.C.A.8th, 1939); Byrd-Frost, Inc. v. Elder, 303 U.S. 647, 58 S.Ct. 646, 82 L.Ed. 1108 (C.C.A.5th 1937), 93 F.2d 30 (1938).

This textwriter also points out in section 0.222 at pages 2607-2610, inclusive, that:

> "In addition to the situation previously discussed, where two *in personam* suits may proceed concurrently, two actions may proceed without interference where one is *in rem* and the other is *in personam*, for irreconcilable conflict arises only when both actions seek to dispose of the same *res*. Thus, where the state court has control of the administration of a decedent's or a ward's estate, an action *in personam* may be instituted in the federal court, the requirements of federal jurisdiction being satisfied, to establish the validity and amount of a claim against the estate, since the federal court's action in no way interferes with the state court's control of the *res*. * * *

"* * * Generally, in all cases where the federal action is *in personam* or partly so, even though it includes *in rem* issues which partly overlap the prior jurisdiction of state courts, 'the federal court should proceed to grant any relief appropriate under the pleadings which will not interfere with the specific properties which have been brought within the jurisdiction of the state courts.'

"Therefore, subject to the rule that one court, federal or state, shall not disturb the possession and control of specific property which is within the prior jurisdiction of the other court, one court may properly adjudicate rights in property in the possession of the other court and may render any judgment 'not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property.'

"In United States v. Klein, (303 U.S. 276, 281, 58 S.Ct. 536, 82 L.Ed. 840, 1938) a leading case in point, the question was whether a judgment of a Pennsylvania court, rendered under authority of a state statute and affirmed by the state Supreme Court, declaring an escheat to the state of money which had been deposited in the Treasury of the United States, was an invasion of federal sovereignty and the prior jurisdiction of the federal court which had disposed of the fund. In an earlier federal action brought by secured bondholders to compel payment of the bonds, plaintiffs had obtained a decree in behalf of themselves and other bondholders similarly situated, the money was paid into court, and the part of the money belonging to bondholders who had made no claim and could not be found had eventually been (re)covered into the federal Treasury. After the lapse of years the Pennsylvania courts declared the money so deposited to be escheated to the state. It was held that there was no conflict with federal authority; that the state decree was merely an adjudication upon the title of the

absentees, which was not prohibited, and that the decree was not founded on possession and did not purport to disturb the possession of the Treasury as depository, which it could not do, and that the question of possession would be open for decision whenever application was made to the federal court for payment over of the fund. (Citation supplied.)

"The same principle was approved and applied by the Supreme Court in the decision of Fischer v. American United Life Insurance Company." (314 U.S. 549, 62 S.Ct.380, 86 L.Ed. 444, 1942, re'g—C.C.A.8th, 1941, 117 F.2d 811) (Citation supplied.)

The appellant contends that it is well-settled that where an action is *quasi in rem,* the court having jurisdiction, first attached, has jurisdiction to proceed to the exclusion of all other courts. It is contended that the case of Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), and the case of Princess Lida of Thurn v. Thompson, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1938), settled the issue here involved in favor of Koehring.

The facts in the Donovan case are as follows:

The City of Dallas, Texas, owned Love Field, a municipal airport, and forty-six citizens brought a class suit in a Texas court to restrain the City from building an addition to the runway to the airport, and from issuing and selling municipal bonds for that purpose. The case was tried and summary judgment was given for the City. On appeal, the Texas Court of Civil Appeals affirmed. The Supreme Court of Texas denied review, the United States Supreme Court denied certiorari. Later, one hundred and twenty Dallas citizens, including twenty-seven of the plaintiffs in the earlier action, filed another action in the U. S. District Court for the Northern District of

Texas seeking similar relief. The complainants sought an injunction against the construction of the runway, issuance of bonds, and payment of bonds already issued. The City filed a motion to dismiss, and an answer to the complaint in the Federal Court. At the same time, the City applied to the Texas Court of Civil Appeals for a writ of prohibition to bar all plaintiffs in the case in the U. S. District Court from prosecuting their case in that court. The Texas Court of Civil Appeals denied relief, holding that it was without power to enjoin litigants from prosecuting an action in the Federal Court, and that the defense of res judicata on which the City relied could be raised and adjudicated in the United States District Court. On appeal from the mandamus order, the Supreme Court of Texas took a different view, however, and held it was the duty of the Civil Court of Appeals to prohibit the litigants from further prosecuting in the U. S. District Court, and stated that a writ of mandamus would issue should the Court of Civil Appeals fail to perform the duty. The U. S. District Court, in an unreported opinion, dismissed the case pending there. One of the petitioners in the Federal Court excepted to the dismissal and appealed to the U. S. Court of Appeals for the Fifth Circuit. The Texas Court of Civil Appeals cited Donovan and the other complainants for contempt. Donovan was sentenced to twenty days in jail. Donovan served the sentence and the Supreme Court granted certiorari to review the State Supreme Court's judgment directed to the Civil Court of Appeals to enjoin petitioners from prosecuting their action in the Federal Court, and granted certiorari to review the Civil Court of Appeal's judgment conviction of contempt. The Court held that:

> "We think the Texas Court of Civil Appeals was right in its first holding that it was without power to en-

join these litigants from prosecuting their federal-court action, and we therefore reverse the State Supreme Court's judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals, which rested on the mistaken belief that the writ prohibiting litigation by the federal plaintiffs was 'valid.'" 377 U.S. at 411-412, 84 S.Ct. at 1582.

The Court then said:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida [of Thurn] v. Thompson, 305 U.S. 456, 465-468, 59 S.Ct. 275, 280, 281, 83 L.Ed. 285. In Princess Lida this Court said 'where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.' Id., 305 U.S. at 466, 59 S.Ct. at 280. See also Kline v. Burke Construction Co. 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226." 377 U.S. at 412, 84 S.Ct. at 1582.

The opinion of the Court then pointed out:

"But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide. While Congress has seen fit to authorize

courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:

> "* * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * *" (Emphasis supplied.) 377 U.S. at 412, 84 S.Ct. at 1582.

In the case of Penn. General Casualty Company v. Pennsylvania ex rel. Schnader, Attorney General, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1934), the United States Supreme Court said:

> "Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See Buck v. Colbath, supra, (3 Wall. 334, 342, 18 L.Ed. 257, 260); Kline v. Burke Construction Co., 260 U.S. 226 [43 S.Ct. 79, 67 L.Ed. 226] * * *. But, if the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see Peck v. Jenness, 7 How. 612, 625, 12 L.Ed. 841; * * * and to protect the judicial processes

> of the court first assuming jurisdiction * * * the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation." (Emphasis supplied.)

In the case of Wells v. Helms, 10 Cir., 105 F.2d 402 (1939), the United States Circuit Court of Appeals, Tenth District, pointed out that:

> "It is well settled that where two, actions involving the same cause of action are pending in a state and a federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief *in personam,* may proceed at the same time and when one action has gone to judgment, that judgment may be set up in the other action as res judicata." 105 F.2d at 404.

Kline v. Burke Construction Company, 260 U.S. 226, 230, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077 (1922), gives this exposition:

> "* * * a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case."

[4] Thus it is seen that exclusive jurisdiction vests in the court first acquiring jurisdiction in *in rem* and *quasi in rem* cases but not in *in personam* cases. The question then resolves itself into the query as to what is meant by the expressions "in personam", "in rem" and "quasi in rem" jurisdiction. In 20 Am.Jur.2d, Courts, section 118 (1965), at page 473, we find the following language:

> "The distinction between jurisdiction *in personam* and jurisdiction *in rem*, which to some extent is covered also in other articles, runs through numerous cases, mostly in connection with the doctrine, established by the United States Supreme Court in the case of Pennoyer v. Neff, (95 U.S. 714, 24 L. ed. 565) that a state court can acquire jurisdiction *in personam* over a defendant only if process has been served on him in person in the state to which the court belongs, unless he has voluntarily submitted himself to the court's jurisdiction, some later cases noting a tendency to deviate from strict application of the doctrine of Pennoyer v. Neff, notably through use of the 'minimum contacts' test.'" (Emphasis and citation supplied.)

Section 119, 20 Am.Jur.2d, Courts (1965) at pages 473, 474, 475 states:

> "A decision in personam imposes a responsibility or liability upon a person directly and therefore binds him personally with regard to every property he possesses, even that over which the court has no jurisdiction *in rem*, and which its decision may therefore not directly affect. On the other hand, a decision *in rem* does not impose responsibility or liability upon a person directly, but operates directly against that particular thing which is called the *res*, irrespective of who is the owner or possessor thereof, and irrespective of whether the owner is subject to the jurisdiction of the court *in personam*. * * *

"* * * Jurisdiction *in rem* is right where the decision sought is of a nature to directly affect real property. A court of one state has no jurisdiction to establish, to pass, or to quiet title to real property situated in another state, or to make any other decision directly affecting real property located in another state, or the title to that real property.

"A decision *in personam* may be rendered by the court of a state with regard to a *res* which is not situated within the state if the decision merely obliges a person subject to its jurisdiction in personam to dispose of the *res*, or to refrain from disposing of it, in the manner prescribed by the decision. * * *" (Emphasis supplied.)

Section 120, 20 Am.Jur.2d, Courts (1965) at pages 475, 476, states:

"According to certain judicial opinions, the classification of jurisdiction as *in personam* or *in rem* is not comprehensive enough, and therefore a third category, jurisdiction *quasi in rem*, has been added. The courts seem not to be in harmony, however, as to the exact meaning of that term and its proper application. Jurisdiction *quasi in rem* has been said to be neither strictly *in personam* nor strictly *in rem*. The term is frequently used to designate an action in personam where a *res is indirectly affected by the decision*. But sometimes proceedings affecting a status or relation, for instance a marital status, are referred to as proceedings quasi in rem." (Emphasis supplied.)

The facts in the case at bar on the question now being discussed have been previously studied and a very comprehensive opinion has been written on this subject. See Dunn v. Stewart, D.C., 235 F.Supp. 955 (1964). In that case the Court said:

"The record before this Court in this case, as it relates to the case in the Chancery Court of Hinds

County, Mississippi, demonstrates that the Chancery Court action, being between a Mississippi corporation and a Wisconsin corporation, then contending that it was not doing business in Mississippi, was fully removable. The presence of the attachment defendants in nowise affected removability. Cramer v. Phoenix Mutual Life Ins. Co. (CA 8), 91 F.2d 141, cert. den. 302 U.S. 739, 58 S.Ct. 141, 82 L.Ed. 571, rehearing den. 302 U.S. 778, 58 S.Ct. 263, 82 L.Ed. 602. Having elected not to remove or attempt to remove the Chancery Court action, Koehring Company should now be estopped in equity to assert that any irreparable injury occurred to it because discovery procedures available in the Chancery Court of Mississippi were not as efficacious as procedures which would have been available in the Federal forum.

"A deliberate examination of the pleadings in Civil Action No. 5911 (formerly Civil Action No. 3175), and in the State Chancery Court proceeding No. 60,068, discloses that both suits, insofar as the Defendant Koehring Company is concerned, were *in personam* actions. Only a money judgment was sought as to them. Black's Law Dictionary, 4th Ed. 899; 21A Words & Phrases, pp. 278-287; Ravesics v. Martin, 190 Miss. 92, 199 So. 282, 285. The Chancery Court attachment proceedings, appurtenant to the principal litigation there and the Chancery attachment proceedings in the U. S. District Court, involved one common attachment defendant, Dalrymple Equipment Company, Inc., a Delaware corporation qualified to do business in the State of Mississippi.

"Attachments in Chancery in the State of Mississippi are unique proceedings in the field of attachment law in the sense that the service of the attachment defendant does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required. Mississippi Code 1942, §§ 2729-2734. Garnishment

will not lie against the attachment defendant at the initiation of the action. As the Supreme Court of Mississippi pointed out in Gulf Refining Co. v. Mauncy, 191 Miss. 526, 3 So.2d 844, the Chancery attachment defendant occupies no security position at all; '(h)e is simply a defendant with all the rights and privileges as such and should simply be summoned to answer the suit as any other defendant is summoned.' The distinctions between Mississippi Chancery attachments and attachments at law are also discussed in Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 21 So.2d 646, 647 [20 So.2d 834, 22 So.2d 497]. Sequestration, injunction and delivery to the Plaintiff under bond are all permissible under the Chancery attachment statutes, but none of these procedures were requested or accomplished in either suit.

"Under the laws of Mississippi, Koehring Company could have entered a special appearance in the Chancery Court to challenge the jurisdiction acquired by attachment. It chose not to do so but defended generally, thus granting to the Court general jurisdiction of the person. Mobile & Ohio R. Co. v. Swain, 164 Miss. 825, 145 So. 627. When it made this election it made the issue of any quasi in rem proceedings as to Dalrymple Company mainly moot. Cf. Pennoyer v. Neff, 95 U.S. 714, 725, 24 L.Ed. 565. In no sense had any fund been taken into the hands of the U. S. District Court in Mississippi by making Dalrymple an attachment defendant. When Dalrymple Company's answers are considered together, they disclose that on the three separate dates on which statements of account between Dalrymple Company and Koehring Company were made, a different set of debt relationships existed on each occasion. Obviously, no funds were actually frozen in Dalrymple Company's hands.

"The attachment did not create any conflict between the concurrent State and Federal jurisdictions. Byrd-

Frost, Inc. v. Elder, supra, is completely analogous to the proceedings here involved.

"Dalrymple Company's answer in the Chancery Court advances the plea to that court that it has already been attached in the Federal Court proceedings and a certified copy of the Complaint in the Federal Court action is made an exhibit to Dalrymple's answer in the Chancery Court. Thus, if any funds *had* been taken into custody by the Federal Court proceeding, the Chancery Court, after this notice, would have been bound not to deal with these funds. This Court, of course, must presume that the Chancery Court of Hinds County would take no proceedings which would in any way affect property which was in fact already seized under the proper processes of the U. S. District Court. Rather, the presumption is that the Chancellor would deal correctly with any such claim when, as and if he would take steps to possess or control any part of the attachment subject matter. Douglas v. New York, N. H. & H. Railroad Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747; Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152."

Judge Griffith, in his Mississippi Chancery Practice, original volume, section 484 (1925), at page 516 points out: "The proceeding is one primary *in rem;* and in order to give jurisdiction in chancery by attachment against a non-resident there must exist the following factors: (1) The non-residence of the debtor; and, (2) either (a) that he owns lands in this state, or (b) that there are effects belonging to him in the hands of a person in this state, or (c) that there is some person in this state indebted to the said non-resident debtor, and (3) the issuance of the proper process against the land, or effects, or debt, as provided by the statute, so as to bring the *res* under the control of the court; and it is well settled that when the jurisdictional facts do not exist the proceedings must be dis-

missed, even though the non-resident defendant has appeared, provided that in his appearance he raise at the outset the defect as to jurisdiction, and thus does not waive it. * * * And moreover, when the jurisdiction is based upon the ground that there is a resident defendant who has in his hands effects of, or is indebted to, the non-resident debtor, not only must the resident defendant be such a person as may be joined, but actually he must be made a co-defendant to the suit. * * *"

It will be noted that our attachment proceeding set out in Mississippi Code Annotated section 2729 (1956) ends with the following sentence: "The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or *if he has entered an appearance.*" (Emphasis supplied.)

[5] From the foregoing facts and authorities, we have reached the conclusion that the Federal District Court in Oklahoma only had *in rem* jurisdiction over the debt owed by Dalrymple to Koehring. Thus, the Federal Court could enjoin the attempted proceedings in the Mississippi Chancery Court only insofar as the dual proceedings to affect the *res* as to the Dalrymple debt—allegedly within the jurisdiction of the Federal Court. The Mississippi Chancery Court decree, however, was a personal judgment against Koehring; it in no way affected Dalrymple's debt to Koehring and the *res* held in the jurisdiction of the Federal Court. It appeared, therefore, the Mississippi judgment is not affected by the Federal injunction and prior proceedings in the Federal Court.

At this point, it should be again noted that the defendant Koehring chose to answer in the State Court, and made no effort to transfer the case to the Federal Court,

as was pointed out by Judge Mize in his opinion in Dunn v. Stewart, supra. In fact, no point was made by Koehring that the complainant Hyde had filed the case in the Federal Court (except in his answer) until pleadings had been filed after the decree had been finally entered by the Chancery Court. It follows that the State Court had jurisdiction to hear and determine the issue joined between the appellant Koehring Company and Hyde Construction Company, Inc., appellee. Particularly in view of the fact that the State Court did not attempt to adjudicate or interfere with the *res* involved in the jurisdiction of the Federal Court and between the parties in that court. We are of the opinion, therefore, that the assignment of error on this point is not well-taken.

By way of emphasis, we also point out that we have consistently held, as a matter of comity, that Mississippi would recognize injunctions issued by another state against its citizens to prevent them from bringing suit in Mississippi to avoid the law of that state. Fisher v. Pacific Mut. Life Ins. Co., 112 Miss. 30, 72 So. 846; Equitable Life Assur. Soc. of the U. S. v. Gex' Estate, 184 Miss. 577, 186 So. 659. The injunctions discussed in these cases are, however, injunctions issued by foreign states, and against persons and corporations subject to their jurisdictions. Moreover, these injunctions are against the individuals and not the courts. 43 C.J.S. Injunctions § 50 (1945),

[6, 7] We recognize that the Federal Court, however, has power to enjoin state court proceedings to protect its jurisdiction over the *res*. 28 U.S.C. § 2283 (State of State court proceedings); De Korwin v. First National Bank of Chicago, 136 F.Supp. 720, (N.D.Ill.1955), 235 F.2d 156 (1956); Alabama Vermiculite Corp. v. Patterson, 149 F.Supp. 534 (W.D. SC 1955). This power however, does

not warrant a Federal Court in enjoining state proceedings, *in personam* or otherwise, that do not interfere with the Federal Court's *in rem* jurisdiction. Albuquerque National Bank v. Citizens National Bank of Abilene, 212 F.2d 943 (C.A. 5th 1954).

[8] Although it may be said that our Mississippi courts have historically recognized the restraining orders of courts of other jurisdictions which have been brought to their attention by way of proper plea, as in the instant case, it is apparent that the trial court cannot be criticized, and certainly not censured, for failing to have recognized an alleged injunction (by way of comity) since the trial court was not properly notified of the federal injunction until after it had rendered its final decree. We are of the opinion that the parties herein should not have been permitted to experiment with the court, and that the trial court acted properly in refusing to recognize (by way of comity) the information that an injunction had been against some of the parties in the Federal Court of Oklahoma.

II

PLEA IN BAR.

[9] It is contended on appeal by the appellee Hyde in a proper plea in bar filed and argued separately, that Mississippi Code Annotated section 1347 (1956) is applicable to the facts in this case with reference to the injunction proceedings obtained during the progress of this case and effectively operates to release all errors in the judgment of the Chancery Court and is in effect a waiver of appellant's right of appeal.

The plea in bar was passed by order of this Court for determination upon final study of this case, and after a

study of the record as a whole, we have reached the conclusion that Mississippi Code Annotated section 1347 (1956) is not applicable under the pleadings and facts developed in this case. Moreover, the facts and proceedings involved herein are of such nature, and so unique, as to require a study and determination of the real issues involved. The plea in bar must therefore be overruled.

III

ISSUES OF FACT

We are now brought to the main issues presented by this appeal. That is to say, whether or not the appellant violated its contractual obligation which resulted in damages to the other contracting party, the appellee, and if so, whether or not the alleged damages were properly shown.

The contract between Hyde Construction Company, a Mississippi corporation, and C. S. Johnson, contained the following:

> "The terms of this contract are as follows:
>
> "(6) The C. S. Johnson Company guarantees the plant and cooling system to operate to the satisfaction of the buyer and to produce a minimum of two hundred cubic yards of specification concrete per hour.
>
> * * * * * *
>
> "It is proposed to cool the aggregates, including sand and the mixed water by means of a vacuum cooling process. The plant is to provide enough cooling so that two hundred cubic yards of concrete per hour can be provided continuously under assumed temperature conditions herein enumerated. The concrete to have a temperature of 47 degrees out of the mixer.
>
> * * * * * *

"The equipment furnished by The C. S. Johnson Company is as follows:

"Item 21 N

Initial installation supervision.

* * * * * *

"The C. S. Johnson Company will have a man follow the job until it is operating satisfactorily."

The contract also contained the provision for delivery of the cooling plant, as follows:

"(4) Delivery. After final approval of this proposed contract by our executive, we estimate shipment in approximately 100 working days from our receipt of your written acceptance of drawings, all permits required by law and other information necessary to proceed with the work."

Hyde offered testimony to show that the contract was finally executed on February 13, 1960; that the one hundred working days allowed by the contract for delivery of the plant expired on or about July 1, 1960. Hyde had scheduled August 15, 1960, when it was expected the concrete pouring would begin. Testimony shows that although Mr. George Holcomb was sent to the Keystone Dam site on the 16-20th of May 1960, as a representative of Koehring in an effort to comply with its contract to design aggregate tanks, however, a part of this tank did not arrive until September 12, 1960. The plant was not put into operation until October 15, 1960. The appellant Koehring offered evidence to show that the plans for the foundation were not submitted to them in time to permit the fabrication of the plant by the date originally scheduled. Moreover, appellant claims that the fact that the part arrived as late as October did not delay the erection

of the plant because (1) the ironworkers who were engaged in building the plant went on strike and refused to build it; (2) the plant was erected by carpenters; (3) these workers had more parts available at all times on the job site than they could erect within the scheduled time. Finally, it is alleged there was actually no time lost in building the dam, since it was completed within the time allowed.

[10] We are of the opinion, however, that the record reveals sufficient evidence, actual and circumstantial, from which the chancellor could have concluded that the cooling plant was not delivered to the appellee Hyde within the time required by the terms of the contract and that Hyde was damaged financially as a result of this delay.

IV

Appellee Hyde offered evidence to show that the appellant Koehring violated its guaranty to furnish a cooling plant that would operate satisfactorily; that neither Hyde, the corporation, nor R. W. Hyde, Jr., its President, nor any of the officers or employees of Hyde knew anything about the operation of a cooling plant, and relied entirely upon the reputation, ability and contractual obligation of Koehring to manufacture, deliver and supervise the erection of a cooling plant capable of cooling the aggregate ingredients used in the making of concrete for the Keystone Dam project. The testimony clearly establishes that the officers and agents of appellant Koehring fully understood why the Hyde Construction Company required it to guarantee the satisfactory operation of the cooling plant. The testimony also shows that the cooling plant did not operate satisfactorily until a great many changes and additions were made to the plant, particu-

larly the addition of a third boiler and the installation of additional primers for the three aggregate tanks, although it is admitted that there were a few times when the plant operated properly for a few hours. Testimony introduced by both parties established the fact that Koehring had never manufactured the type of cooling plant it guaranteed to operate satisfactorily in the instant case. Moreover, the agent sent to supervise the installation of the plant, had no previous knowledge or experience in erecting a vacuum cooling plant. It also appeared that there were known methods of reducing the temperature and wetting the aggregate before it was conveyed to the cooling tank, and which were not made known to the Hyde Construction Company by Koehring until long after the cooling plant had failed to operate to the satisfaction of either Koehring, the manufacturer, or Hyde, the contractor. Koehring, while not admitting that the plant failed to operate properly, contended that the many "breakdowns" and "slowdowns" and periods when the plant was inoperative were brought about by other factors, among which were: the operating personnel were inexperienced and inefficient, the water caused the boilers to fail and it was Hyde's duty to furnish proper water, the aggregate was out of specification, the aggregate stockpile was not promptly replenished, and the concrete forms for holding the concrete were not constructed at the proper time, so that the plant was required to remain inoperative for a long period of time. It also offered evidence to show that the cranes used to lift the cement buckets from the truck were often out of use because of "breakdowns"; that there were not enough "open spaces" on the dam to permit the continuouis operation of the plant; and that Hyde did not have sufficient trucks to promptly convey the cement from the plant to the "hole" or monolith where the concrete was actually poured.

We have reached the conclusion on this point, however, that all of the foregoing facts and other evidence detailed and enumerated in this voluminous record were issues of fact for the determination of the trial court on the question of whether or not the manufacturer failed to carry into effect its "guarantee" expressed in the contract between the parties. The trial judge was of the opinion that: "The cooling system of the plant never, at any time prior to the latter part of July, 1961, was satisfactory to the complainant, and during this time the defendant was making changes, additions and substitutions of parts and equipment. The defendant never at any time considered its part of the contract fully executed."

[11] We are unable to say that the chancellor was manifestly in error in holding that the appellant failed to carry into effect its contractual guarantee, and must therefore affirm the decree on his finding of fact.

V

ISSUE OF DAMAGES

The method used in determining the amount of damage in this case has given this Court more trouble than the issue of fact previously outlined, because some of the testimony on damages offered by both parties bordered upon guesswork and uncertainty.

Appellee Hyde offered proof to show that because of the failure of appellant Koehring to deliver the plant in the time required by the terms of the contract, Hyde was required to expend $11,859.26 overtime expense in erecting the plant. The proof of this item was a matter of bookkeeping and was relatively simple. On the other hand, the proof of the loss of production caused by the failure of the plant to perform as "guaranteed" was a problem of no mean consequence. The complainant Hyde,

in an effort to meet the required burden of proof of damages, offered the following method. Hyde divided the operation of the construction of the Keystone Dam into four parts. It then took two periods of time during the erection of the Keystone Dam project, and offered proof to show these periods were comparable in length of time, similar in activity, effort and handicap. It then offered evidence to show that after the plant had been properly erected by Koehring, it produced 15,500 cubic yards of concrete per week, whereas prior to the modification of the plant, it produced approximately 9,900 cubic yards of concrete per week. This was a loss of production of approximately 5,600 cubic yards of concrete per week for a period of nineteen weeks, or a total of 106,400 cubic yards of concrete. It then calculated that 9,000 over the common denominator 15,500 shows the loss of 36% in production. Hyde offered proof that its fixed expenses (such as overhead depreciation and indirect costs), amounted to $21,100.01 per week, and that a loss of 36% production for a period of nineteen weeks amounted to $136,728.06.

Hyde further offered proof to show that during the period when there was a 36% loss of production due to inability of the plant to produce the required concrete, it was necessary for Hyde to expend $273,865.19 as labor costs to mix, haul and pour the concrete, and that a loss of 36% in production resulted in the loss of $98,588.23; that when this figure has been multiplied by 1.12 (payroll tax and insurance) there was a total loss of $110,318.82 for labor. The 36% loss of production was thus used to calculate a monetary figure to show damages suffered by Hyde on the separate items of labor and expenses.

In reply to this method of making proof of damage, the Koehring Company offered to show that the periods

of time selected by Hyde to show the "unsatisfactory" and "satisfactory" operations of the plant were not comparable, because (1) the personnel in charge of operation of the plant had changed in the two periods; (2) new roads had been built, facilitating the unloading of the cement; (3) new trucks, cement buckets and other equipment, including cement pouring forms, had been purchased in addition to the equipment used during the allegedly "unsatisfactory" period; and (4) more places and spaces were provided for the reception of the concrete in the spillway, and during the "unsatisfactory" period, certain "slowdowns" were caused by the weather and an unexpected fault discovered in the base of the dam. Moreover, it is said, that the 36% loss of production figure did not take into account additional costs of material and labor expended during the "satisfactory" period. Testimony was also offered to show that the assumed 36% calculation of loss does not conform to generally accepted accounting practices, because the fraction used has an erroneous denominator of 15,500; that this calculation is based on the assumption that full capacity was attained in the use of the cooling plant during the "unsatisfactory period" from March 1961 to July 15, 1961, as well as the "satisfactory period" from July 16, 1961 to December 1, 1961. Moreover, the 36% is said to be based upon the entire cost of the construction, rather than the cost of cement manufacturing alone.

Appellee offered evidence to show additional damages in that Hyde was required to pay $88,202.92 in addition to the original cost of the cooling plant for labor and modifications, and additional equipment, including a third boiler which was necessary and essential and required equipment as a part of the plant before it would operate "satisfactorily." The chancellor was of the opinion that this additional payment should be recovered as damages to Hyde. We agree that this item was clearly shown by the testimony.

We are also of the opinion that the trial court had ample evidence on which to base the determination that the two periods of time were comparable and that a production loss of 36% was fairly shown by the evidence.

[12] Although the method used in obtaining the measure of damages is not entirely without fault, it may be said, as a general rule, that a party who has broken his contract will not be permitted to escape liability because of the lack of a perfect measure of damages caused by his breach. Therefore, a reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case, and which will enable the trier to arrive at a fair approximate estimate of loss is sufficient proof. We are of the opinion that the method used in determining the measurement of damages for the breach of the contract in this case is fair, and this Court will not set aside the judgment obtained for the breach of the contract, although it may be said the method used here is not considered perfect. Nevertheless, except as to one item, we are of the opinion that the proof of damages was sufficient to sustain the judgment. See Billups Petroleum Co. v. Hardin's Bakeries Corp., 217 Miss. 24, 63 So.2d 543, 64 So.2d 764 (1953); Montgomery Ward & Co. v. Hutchinson, 173 Miss. 701, 159 So. 862 (1935); Shell Petroleum Corp. v. Yandell, 172 Miss. 55, 158 So. 787 (1935); Miss. Power & Light Co. v. Pitts, 181 Miss. 344, 179 So. 363 (1938); Hawkins Hdw. Co. v. Crews, 176 Miss. 434, 169 So. 767 (1936); United Press Ass'ns v. McComb Broadcasting Co., 201 Miss. 68, 28 So.2d 575, 30 So.2d 511 (1947); Vicksburg, Meridian R. R. v. Ragsdale, 46 Miss. 458 (1872).

We cannot approve one item of damage allowed by the chancellor against the appellant because we are of the opinion that the court was manifestly wrong in allowing damages for "winter protection." Appellee Hyde offered tes-

timony to show that it had been damaged in the sum of $51,733.71 because—it is said—Hyde was required to make extra expenditure for the winter protection of 138,864 cubic yards of concrete during the period from November 1, 1961 through March 1, 1962. We have reached the conclusion from all the testimony introduced on this item of damage that Hyde would not have completed its pouring of concrete before the Spring of 1962 in any event. Hyde would have necessarily been required to have furnished winter protection during the period for which this claim is made in some quantity of cubic yards of concrete poured. Moreover, the proof as to how much concrete would have been poured, and how much additional cubic yards of concrete—if any—would have required winter protection during this period is speculative. It is unsafe to base a judgment on conjecture. Berry v. Brunt, 172 So.2d 398 (Miss. 1965). The item of winter protection and the interest thereon should not have been allowed, and will be disallowed in the judgment of this Court.

VI

QUESTIONS OF LAW

Since we have held in the outset, in this opinion, that the State Chancery Court had concurrent jurisdiction with the Federal Court to try and determine the issues presented in the suit filed in that court, and since we are of the opinion that the suit in Chancery was *in personam* and not *in res*, the court properly proceeded to try the cause and reach a judgment. We are now confronted with the alleged errors of law presented for our consideration on appeal.

[13] It is argued that there was no breach of the contract by Koehring as a matter of law because there was no time for performance fixed in the contract, notice and

demand was necessary before Koehring could be held liable, and no notice was given to Koehring.

Appellant has cited several authorities from other jurisdictions on this proposition, including 17 Am.Jur.2d, Contracts, section 356 (1964), in support of its contention. An examination of these authorities, however, has convinced us that they are not applicable to this case, not only because the contract required Koehring to supervise the erection of the cooling plant but because appellant's agent sent to aid appellee kept appellant informed of the malfunction of the cooling plant day by day, as the work progressed. The evidence shows that appellant knew about the malfunction of the plant, and was in a constant state of activity in an effort to remedy the defects.

[14] It is next contended that the contract did not fix a time of performance when the cooling plant would operate "to the satisfaction of the buyer", and that the plant did finally operate satisfactorily, therefore there was no breach of the contract. We are also of the opinion that this rule is not applicable in the present case, because the warranty, (or "guaranty", as it is called in the contract,) like any other warranty implied or written, took effect at the time of the consummation of the contract, (46 Am.Jur., Sales, section 300, 1943). At the time the contract in this case was entered into, it was obviously intended there would be a period during which Koehring would supervise the installation of the equipment. It was intended that the plant should operate after its erection in conjunction with the operation of the "batch plant," for the purpose of pouring concrete. This it never did until it was modified.

[15] It is seriously contended that the provision in the contract, whereby Hyde was to pay 25% of the list price when the plant was operating "satisfactorily", and the fact that Hyde made payment pursuant thereto, operated as a

release of all claims for damages for an alleged breach of the contract. We are not intrigued with this argument because the testimony shows conclusively that the Hyde Corporation, and R. W. Hyde, individually, made continuous efforts to get Koehring to remedy the defects in the cooling plant. Every experiment suggested by Koehring was promptly followed, even the expensive suggestion of modification of the plant. Moreover, the appellant Koehring continued its efforts to remedy the defect in the cooling plant after the notes were given. The argument that Hyde waived any breach of the contract requiring the cooling plant to operate satisfactorily, based upon the fact that Hyde gave notes for the purchase price of the equipment after he had knowledge of the defects of the plant purchased and is thus estopped to claim damages for the breach of the warrant, is not well-taken. Appellant has cited the following cases as authority for this proposition: Anderson v. First Securities Co., 185 Miss. 500, 188 So. 548 (1939); Alig v. Lackey, 114 Miss. 392, 75 So. 139 (1917); Colt v. Kelly, 142 Miss. 617, 107 So. 757 (1926); Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927); Cherokee Mills v. Conner, 164 Miss. 704, 145 So. 735 (1933); Memphis Automatic Music Co. v. Chadwick, 164 Miss. 635, 146 So. 137 (1933).

These cases state the rule that the execution of a new contract or the promise to pay the original notes in consideration of the extension of time to pay the purchase price—after full knowledge of defects in the article purchased—operates to waive a defense to an action for the purchase price on the ground of breach of warranty. It may be pointed out that the case at bar is not a *defense* to the payment of notes based upon breach of a prior warranty known at the time of the execution of the notes (or renewal) for the purchase price of the articles sold, but the instant action is a suit for damages for the breach of a

contract for failure to carry into effect the "guarantee" set out in the contract. The article purchased under the contract here involved is not such as could be returned to the seller, the contract rescinded and another obtained or purchased upon the open market. The contract in the case at bar involves the purchase of machinery, a plant designed to do a particular job. The plant was massive in design and the installation alone was a stupendous undertaking. The purchse price and installation costs amounted to more than a million dollars. It was designed to operate in conjunction with a concrete "batch plant", and after having been erected, time to pour concrete became a moving factor. The purchaser's purpose in buying the plant was to pour concrete in the adjacent Keystone Dam. This was known to the seller. Hyde had no alternative or opportunity to reject the cooling plant. The work had to proceed and it was necessary to do everything possible to immediately get production out of the cooling plant. Hyde made arrangements to get an ice plant but appellant made modification to its cooling plant, and Hyde cancelled the order for the ice plant. Both contracting parties continued to do everything possible to make the plant produce. Moreover, the contract required the seller, Koehring, not only to furnish "the initial installation supervision", but to have a man follow the job until it was operating "satisfactorily." The obligation to render defects in the operation of the plant was therefore a continuing obligation which Koehring recognized and performed long after the buyer Hyde had given the notes, now claimed to be a waiver of the "guarantee" set out in the contract. We are of the opinion that the payment of the purchase price, or the giving of the notes for the purchase price of machinery designed for a particular job under the circumstances, as shown by the testimony in this case, is not a waiver of the warranty clause in the contract, nor is the purchaser estopped to

bring an action for damages growing out of the breach of the contract.

It is pointed out by the textwriter in 46 Am.Jur., Sales, section 730 (1943), at page 854, that:

> "It has been held that the fact that the buyer pays the price after notice of defects in the goods constituting a breach of the seller's warranty does not constitute a waiver of the breach so as to preclude him from maintaining an action therefor. * * * Whether giving a note is a waiver is at most a question of fact. Likewise, where the article warranted was purchased on credit, the giving of renewal notes for the price is not necessarily a waiver of the buyer's claim for damages. There would seem to be no ground for a claim that the buyer has waived a breach of warranty of the efficiency and quality of machinery sold by its use of the machinery during continued attempts of the seller to remedy defects therein."

See also Dancey v. Sugg, 46 Miss. 606 (1872); Stillwell Bierce & Smith Vaile Co. v. Biloxi Canning Co., 78 Miss. 779, 29 So. 513 (1901); 77 C.J.S. Sales § 347a, p. 1250 (1952); 77 C.J.S. Sales § 366c, p. 1287 (1952); Carver Gin and Machinery Co. v. Gaddy, 62 Miss. 201 (1884); Bowers v. Southern Automatic Music Co., 114 Miss. 25, 74 So. 774 (1917); Christian & Brough Co. v. Goodman & Garrett, 132 Miss. 786, 96 So. 692 (1923); Morrow v. Barron Motor Co., 229 Miss. 51, 90 So.2d 20 (1956).

In conclusion, appellant argues that the evidence in this case preponderates in its favor; that the delays "shutdowns" and inactivity of the concrete pouring operation at Keystone Dam were not the result of defects in the cooling plant but were brought about by many other causes, including the fact that Hyde was required to pour additional concrete to fill a land "fault" discovered at the base of the dam. Appellant insists that the court overlooked the testi-

mony of a similar claim filed with the United States Corps of Engineers for the same damages sought in the instant cause of action, based upon a different reason. We feel that we have already answered this argument under Section IV, but again we point out that the various issues of fact have been settled and determined by the opinion of the Chancellor in the decree of the Chancery Court, and with the exception of the amount allowed for winter protection, we are unable to say the Chancery Court was manifestly wrong in its determination of the facts.

[16] Finally, we are of the opinion that the decree of the Chancery Court awarding damages to Hyde Construction Company against Koehring Company, Inc., should be affirmed, but that the sum of $51,733.71 allowed as extra costs for winter protection, and the sum of $3,155.76 allowed as interest, totaling $54,889.47, should be deducted from the total award shown in the decree of the Chancery Court, against the total sum of $464,450.08, leaving a balance of $409,560.61. Interest of six percent on the balance from April 1, 1963, (the final interest date shown in the decree of the Chancery Court) until the date of the order of this Court is hereby allowed.

The decree of the Chancery Court is hereby affirmed in part (the sum of $409,560.61) and reversed in part, (winter protection and interest, $54,889.47), and judgment is hereby rendered against Koehring Company in favor of Hyde Construction Company in the sum of $409,560.61, plus six percent interest thereon, from and after April 1, 1963.

Affirmed in part, and reversed in part, and judgment rendered.

All Justices concur.

APPENDIX D

Judgment of Supreme Court of Mississippi, Dated February 7, 1966.

In the Supreme Court of Mississippi

Monday, February 7, 1966 Court Sitting:

Koehring Company vs. Hyde Construction Company, Inc.; 43,572.

This cause this day came on to be heard on the motion of the appellee, Hyde Construction Company, Inc., to correct the judgment heretofore entered in this cause and this Court having sufficiently examined and considered the same and being of the opinion that the same should be sustained in part doth order and adjudge that said motion be and the same is hereby sustained and the following entered as the final judgment in this cause, to-wit: This cause having been submitted at a former Term of this Court on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 8th day of April 1964—be and the same is hereby affirmed in part, and reversed in part and this Court now here proceeding to render and enter the judgment that should have been entered in the Court below doth order and adjudge and decree that the appellee, Hyde Construction Company, Inc. do have and recover of and from the appellant, Koehring Company, jointly with Fidelity & Deposit Company of Maryland, surety on the supersedeas bond, the sum of $406,396.89 with interest at the rate of 6 per centum per annum from and after April 8, 1964 until paid, and all of the costs in the Court below; the costs on appeal are taxed one-half against the appellant and one-half against the appellee, for which and all of which let proper process issue.

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APPENDIX E

Motion of Hyde Construction Company Filed in the Oklahoma District Court, Styled "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause". (Without Exhibits)

Amended And Supplemental Motion To Dissolve Injunction And Vacate Order Of Civil Contempt And To Dismiss Cause
[5911]

Now comes Hyde Construction Company, Inc., and without waiver of its objections to jurisdiction and venue or of its original or its amended and supplemental motion to transfer the case back to the Court in which it originated, respectfully moves the Court to dissolve the injunction imposed by this Court's order of September 1, 1964, against proceedings of the State Courts of Mississippi for collection of the Judgment against Koehring Company in Cause No. 60,068 in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and in Cause No. 43,572 in the Supreme Court of Mississippi and to vacate its order in civil contempt, and to dismiss this cause without prejudice, and for grounds would show:

1. Since the injunction against collection was issued, the Decree of the Chancery Court of Hinds County, from which the Koehring Company appealed, has been affirmed (as modified) and a final judgment has been entered by the Supreme Court of the State of Mississippi.

2. The Supreme Court of Mississippi, on the appeal of the Koehring Company, has adjudicated finally: (1) That the Chancery Court acted only on purely in personam aspects of the case; and (2) That the State Courts had jurisdiction of the parties and subject matter; and (3) That the State Courts had the right and duty to pro-

ceed and to enter the final judgment in personam on the merits of the case.

3. The judgment of the Supreme Court of Mississippi is entitled to full faith and credit in the Courts of the United States under 28 U.S.C. 1738 and under the Constitution of the United States (Art. IV, Section 1), and under the law of the land.

4. The State judgment is final and fully enforceable and is res judicata under the laws of the State of Mississippi, and is entitled to be allowed the same effect in all other Courts and jurisdictions under the full faith and credit doctrine.

5. The injunction against collection is an injunction to stay proceedings of a State Court contrary to 28 U.S.C. 2283.

6. The State Chancery Court dealt only with the purely in personam aspects of the controversy between the litigants. The order to stop the proceedings on the motion of the Koehring Company was erroneous, if not wholly void, as to such in personam aspects of the proceedings, and cannot support sanctions in favor of the moving litigant in civil contempt.

7. This cause has been tried on its merits at great expense. The resulting Judgment has become a property right vested in Hyde Construction Company, Inc. and its assigns. For these and other reasons apparent, the withholding of full faith and credit from the judgment in Movant's favor on the merits would be to deprive it of its property without due process of law, contrary to equity and law and to the Constitution of the United States.

8. The case was fully and fairly tried in the State Courts. The Koehring Company did not withdraw from the State Court proceedings in reliance upon the restraining order of this Court, and did not elect to remove the

case to the Federal Court, but invoked the jurisdiction of the State Courts and fully participated in those proceedings. Wherefore, the Koehring Company is now estopped from asserting, by collateral attack, any alleged rights contrary to or at variance with the adjudication and judgment resulting from such proceedings.

9. This Court was without jurisdiction because the case had been dismissed by notice under Rule 41 of the Federal Rules of Civil Procedure, which notice was recognized as effecting a dismissal by the order of the United States District Court for the Southern District of Mississippi prior to the transfer order of Judge Brown of the Fifth Circuit.

This motion is based upon the record now on file and in further support hereof, Movant attaches hereto and incorporates herein, by reference, the following exhibits: (A) The Complaint in Cause No. 60,068; (B) the Answer of Koehring Company in Cause No. 60,068; (C) the Final Decree of the Court in Cause No. 60,068; (D) the Notice of Appeal to the Supreme Court of Mississippi and Appeal Bond in Cause No. 60,068; (E) the Assignments of Error on Appeal; (F) the Motion of Appellee to Dismiss the Appeal; (G) the initial Opinion of the Supreme Court and Judgment thereof; (H) the Suggestions of Error by Appellant; (I) the Motion of new counsel for leave to file a brief on Suggestion of Error; (J) the Motion of Appellee to Correct Judgment; (K) the Opinion of the Supreme Court of Mississippi overruling Suggestions of Error; (L) the Opinion of Supreme Court of Mississippi on Motion to Correct Judgment; and (M) the Final Judgment of Supreme Court of Mississippi, dated February 7, 1966: all authenticated according to the Acts of Congress.

Specifically in support of Item No. 8 above, and generally, to the extent applicable, in support of all other items

hereof, Movant files herewith and incorporates herein by reference a complete transcript of the pleadings, orders, findings, opinions, testimony, evidence, exhibits and proceedings filed and developed in the Chancery Court of the First Judicial District of Hinds County, Mississippi, in Cause No. 60,068, and in the Supreme Court of Mississippi on appeal in Cause No. 43,572, all authenticated according to the Acts of Congress, except only that certain bulky exhibits, movie films and physical objects sent to and now on file in the Supreme Court of Mississippi in original form, as more particularly identified by the list included in the Certificate of the Clerk of the Supreme Court and on the copy of the Motion hereinafter referred to, are not physically filed contemporaneously with the filing of this Motion, but are incorporated herein by reference, subject to later physical filing when the same become available to Movant.

As to said omitted exhibits in original form, a Motion for leave to withdraw said exhibits has been filed with the Supreme Court of Mississippi and served on counsel for the Koehring Company, copy of which said Motion is hereto attached, and Movant represents that unless counsel for the Koehring Company object or the Court refuses leave to withdraw said original exhibits, the same will be withdrawn by Movant and filed with the Clerk in this cause as a part of Exhibit N hereto, all to the end that this Court may be fully apprised of all matters, facts and things which were before the Courts in said Chancery Cause No. 60,068 and Supreme Court Cause No. 43,572. Said transcript filed contemporaneously herewith and the exhibits hereafter to be filed will be collectively referred to as Exhibit N to this Motion.

Respectfully submitted,
Charles Clark
Davis H. Sanders
Attorneys for Plaintiff

Filed March 21, 1966.

APPENDIX F

Opinion of the Court of Appeals for the Tenth Circuit on Hyde's Appeal from the Order Denying the Amended and Supplemental Motion.

UNITED STATES COURT OF APPEALS*
TENTH CIRCUIT

No. 8717—JANUARY TERM, 1968

HYDE CONSTRUCTION COMPANY, INC.,
Appellant,
v.
KOEHRING COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Okla-

*Reported in 338 F.2d 501.

homa. Hyde contracted with Koehring for the design and installation by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F. 2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964, and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground

of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial.

On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's

attorneys, and the state court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court

had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceedings in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 857.

On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further proceedings in the Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966.

See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is disposed of by an opinion filed contemporaneously with the opinion in this case.

We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U. S. C. § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue—one in state court and one in federal court. Ordinarily, one trial of a controversy is enough.

Koehring argues that the issues raised by the motion to dissolve the injunction were finally and completely determined by the decision of the Supreme Court in Koehring

Company v. Hyde Construction Company, 382 U.S. 362. That case in the court of appeals presented questions as to the jurisdiction of the Oklahoma federal court and as to the validity of the injunction. The court of appeals held that the Fifth Circuit's order of instanter transfer was invalid and did not reach the other issues. The Supreme Court granted certiorari and reversed summarily. In so doing it summarized the action of the district court and recited the provision of the order that "the civil suit between the parties [be] retried — this time in Oklahoma and in federal court." The Court concluded that, in the special circumstances of the case, the Oklahoma federal court acquired jurisdiction on March 11 under the Fifth Circuit's instanter transfer and that "the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground." The Court remanded the case to the Oklahoma federal court "for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions."

Koehring argues that the decision of the Supreme Court means that the federal injunction against the state trial was valid. We do not read the opinion of the Supreme Court to intend such effect. The validity of the injunction is not discussed in spite of the fact that it was attacked on grounds which raise serious questions bearing on the relationship of federal and state courts. The use in the opinion of the word "retried" has no significance to us because it appears in a recital of the provisions of the order of the Oklahoma federal court. The remand is for further proceedings consistent with the opinion but the opinion does no more than sustain the transfer jurisdiction. The remand recognizes the right of the parties to

seek a transfer back to the federal court in Mississippi. This is not consistent with any idea that the Supreme Court intended to order a trial on the merits in Oklahoma federal court.

Hyde filed in the Supreme Court a "Petition for Rehearing And Motion To Amend Order of Remand." Therein it pointed out that the court of appeals, because of its ruling on the jurisdictional point, had declined to consider the other issues presented by Hyde. Such questions included the effect of the voluntary dismissal under Rule 41(a)(1) and the validity of the restraining order and injunction under 28 U.S.C. § 2283. Hyde asked that the case be remanded to the court of appeals for the determination of these questions. The Supreme Court denied the petition for rehearing and the motion to amend the order of remand. See Koehring Company v. Hyde Construction Company, 383 U.S. 939. Koehring interprets this denial as decisive of the points raised. We see the situation differently. In the exercise of its discretionary powers, the Supreme Court chose to confine its decision to the narrow jurisdictional point and in so doing did not express an opinion on the merits of the injunction. This failure to express an opinion does not amount to a determination that the points raised were decided adversely to Hyde. The points are substantial — not frivolous. One relates to the effect of a conditional dismissal under Rule 41(a)(1) — a point on which no appellate authority appears to exist. The other relates to the propriety of the injunction under one of the exceptions to 28 U.S.C. § 2283. It seems improbable to us that the Court would dispose of the merits of a case in this sensitive area without full-fledged presentation and without discussion of pertinent decisions.[1]

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1. E.g. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, and Kline v. Burke Construction Company, 260 U.S. 226, 232-233.

Koehring also argues that the remand to the district court rather than to the court of appeals shows that the Supreme Court intended that the validity of the injunction was settled. We find no such intent. Although the remand could have been to the court of appeals for consideration of the questions other than jurisdiction, the fact that such remand was not made does not mean that those other issues were decided. In our opinion the Supreme Court did not foreclose Hyde from the assertion of the issues now raised.

Koehring next urges that on the return of the case to the district court Hyde may urge only new and unforeseen circumstances in a motion to dissolve the injunction.[2] This argument assumes that the points raised by Hyde have been foreclosed. We reject the assumption. Hyde is entitled to have its contentions heard in an appellate court. Additionally, there is a changed circumstance. The Mississippi state court in personam judgment has been sustained, with a reduction in damages, by the state supreme court after full submission and consideration of jurisdictional questions; and the judgment has become final because of the failure of Koehring to seek certiorari review.

These conclusions make necessary consideration of the attack by Hyde on the injunction. Hyde says that the Mississippi federal court action was dismissed voluntarily under Rule 41(a)(1) before the transfer to the Oklahoma federal court. After the Court of Appeals for the Fifth Circuit ordered the district court to transfer the case to the Northern District of Oklahoma, Hyde filed in the Mississippi federal court a motion in three parts. Part A

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2. See System Federation v. Wright, 364 U.S. 642, 647, (modification of a consent decree because of change in law), and United States v. Swift & Co., 286 U.S. 106, 114 (claim of changed facts).

sought the revocation of the transfer order because of changed circumstances. Part B was a notice of dismissal under Rule 41(a)(1). Part C said that if Hyde was mistaken under Parts A and B, then it requested a dismissal by the court. The court declined to revoke the transfer as requested under Part A, held that the notice of dismissal was good, and dismissed the action.

Rule 41(a)(1) provides for a dismissal without order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer * * *." Hyde said, in effect, to the Mississippi federal court that if the case was not kept there, the case was dismissed. Such a conditional notice of dismissal is not within the scope of Rule 41(a)(1). The purpose of that rule is to provide a means for terminating an action automatically by filing with the clerk a notice of dismissal. That notice closes the file; no order of the court is needed.[3] If the conditioning of notices of dismissal is allowed, the clerk of the court will be called upon to exercise a duty more than merely ministerial. Instead of simply closing the file of a case once the notice of dismissal is filed, the clerk will have to construe the condition and perhaps even become a fact-finder to determine when the condition is satisfied. This defeats the purpose of Rule 41(a)(1) to provide a quick, automatic means of ending an action.

In the instant case, Koehring had served an answer on Hyde before the condition was met. Rule 41(a)(1) is effective only until an answer is served by an adverse party. Hyde argues that a party cannot avoid the effect of a notice of dismissal without prejudice by answering after he has been notified that plaintiff intends to file a

3. American Cyanamid Co. v. McGhee, 5 Cir., 317 F. 2d 295, 297.

notice of dismissal. The cases cited for this point hold only that a defendant may not defeat Rule 41 (a)(1) in removal cases by winning the race to the courthouse to file an answer immediately after the removal transcript is filed, or by serving an answer if he has notice that the plaintiff wishes to dismiss as soon as the transcript is filed. That is a far cry from saying that the plaintiff may prevent the defendant from answering for so long as the plaintiff is seeking determination of preliminary procedural issues.

The fact that the court, rather than the clerk, made the order of dismissal does not change the situation. The court acted on the basis that the notice under Rule 41(a)(1) was valid. The Court of Appeals held directly to the contrary and said "the District Judge is hereby ordered to vacate the order or orders of dismissal entered on February 24, 1964 * * *."[4]

So far as we are concerned this action by the Fifth Circuit is the law of the case. We believe that it is correct and we accept it. In our opinion the attempted dis-

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4. In an unpublished opinion appearing in the record in this case, the Fifth Circuit said: "* * * the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41 (a) (1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a 'filing [of] a notice of dismissal' as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion."

missal did not oust either the Mississippi federal court or the Oklahoma federal court of jurisdiction.

The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C. § 2283. That statute forbids a federal court to enjoin state court proceedings except when expressly authorized by Congress "or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." Koehring says that the injunction is necessary to protect the federal jurisdiction.

The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant "does not bring any fund into the pos-

5. See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U. S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67, 70.

6. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F. 2d 89, 100, modified in non-pertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F. 2d 582, 585.

7. See Mississippi Code Annotated (1956) § 2729.

session, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required."[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to jurisdiction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the "in aid of its jurisdiction" exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented

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8. Koehring Company v. Hyde Construction Company, (Miss.) 178 So. 2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F. Supp. 955, 966.

9. See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67.

by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order of the court below restraining the entire state action was not necessary and cannot be sustained.

The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. We conclude that the injunction was not within the § 2283 exception permitting a stay in aid of federal jurisdiction.

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10. In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possesion acquires exclusive jurisdiction, * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

11. 28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

12. See IA, Moore Federal Practice ¶ 0.220, p. 2604.

Koehring argues further that the stay was permissible to protect or effectuate the federal judgment of the Fifth Circuit ordering the transfer to the Northern District of Oklahoma. We have held that the protection-of-judgments exception in § 2283 was included within the 1948 revision of the Judicial Code to overcome the effect of the decision in Toucey v. New York Life Insurance Co., 314 U.S. 118, and "to give Federal Courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts."[13] It may be that in some situations the exception extends to interlocutory orders[14] but we have no reason here to recognize any such exception. The Fifth Circuit decided only where the federal case should be tried under the federal *forum non conveniens* law. The restraining order against proceeding in the Mississippi state court was expressly vacated by the Fifth Circuit. The Mississippi proceedings in no way conflict with the decision that the Northern District of Oklahoma is the more convenient federal forum. Our conclusion is that the Oklahoma federal injunction is not within any of the exceptions found in § 2283 and consequently is forbidden by that statute.

The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the efficacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state

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13. Jackson v. Carter Oil Co., 10 Cir., 179 F. 2d 524, 526-527, cert. denied 340 U.S. 812.

14. See Sperry Rand Corporation v. Rothlein, 2 Cir., 288 F. 2d 245, 249.

court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties —Koehring and Hyde—and identity of subject matter—jurisdiction of the Mississippi court to proceed. The principles of res judicata apply to questions of jurisdiction.[16]

Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the

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15. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 842-850.

16. American Surety Co. v. Baldwin, 287 U.S. 156, 166.

17. See Donovan v. City of Dallas, 377 U.S. 408, 412.

18. Hart and Wechsler, The Federal Courts and The Federal System, 1057.

September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such remedy "falls with an injunction which events prove was erroneously issued."[22] Accordingly, the adjudi-

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19. Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F. 2d 643, 647, reversed on other grounds 382 U.S. 362.

20. See Pan American World Airways, Inc. v. Flight Engineers' International Association, 2 Cir., 306 F. 2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F. 2d 931.

21. Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

22. United States v. United Mine Workers of America, 330 U.S. 258, 295.

cation for civil contempt and the penalty imposed therefor cannot stand.

Hyde urges us to order the dismissal of the case on the ground of res judicata. We decline to do so. The case is here on the sole issue of the propriety of the denial of the motion to dissolve the injunction. Our decision on res judicata is limited to the application of that principle to the question of the jurisdiction of the Mississippi courts to proceed with the state trial. The merits are not before us. The plea of the application of the bar of res judicata to the merits, and all other questions pertaining to the merits of the controversy, must be decided by the district court in the first instance.

The injunction is dissolved. The judgment for civil contempt is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX G

Excerpt from Brief of Respondent on Petition of Koehring (No. 567) for Certiorari Review of Order Overruling Motion to Dismiss Appeal. (Certiorari Denied 385 U.S. 949, 87 S.Ct. 323)

CASES IN POINT

While the mandate of the Supreme Court is controlling upon all matters within its compass, this does not mean that lower courts may not freely proceed upon undecided issues. *Sprague* v. *Ticonic Nat. Bank,* 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1148.

A case closely in point on its facts is *Christoffel* v. *United States,* (C.A. D.C. Cir., 1954) 214 F.2d 265, cer. den. 348 U.S. 850, 75 S. Ct. 75. The opinion states, in part, as follows:

"Appellant's conviction of perjury was affirmed by this court in Christoffel v. United States, 84 U.S. App. D.C. 132, 171 F.2d 1004, but reversed by the Supreme Court, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826. Upon retrial appellant was again convicted and we affirmed, 91 U.S. App. D.C. 241, 200 F.2d 734. He again petitioned the Supreme Court for a writ of certiorari. Without briefs on the merits or argument the Supreme Court in a single *per curiam* order granted certiorari, vacated the judgment of this court and remanded the case to the District Court for resentencing under 18 U.S.C. § 231 (1946).[1] Christoffel v. United States, 345 U.S. 947, 73 S. Ct. 868, 97 L. Ed. 1371. This was done. Christoffel again appeals, raising questions not connected with the resentencing which occurred pursuant to the mandate of the Supreme Court, but directed to the earlier District Court proceedings which preceded our decision in 91 U.S. App. D.C. 241, 200 F.2d 734.

"The Government urges that since the mandate of the Supreme Court required, in addition to vacation of our judgment, only resentencing of Christoffel by the District Court, we are without jurisdiction on the present appeal to consider questions unrelated to the resentencing itself.

"We may not review action taken as required by a mandate of the Supreme Court. It is for that Court to construe its own mandate as to all matters encompassed by it. In re Sanford Fork & Tool Co., 160 U.S. 247, 255-256, 16 S. Ct. 291, 40 L. Ed. 414; Gaines v. Rugg, 148 U.S. 228, 238, 13 S. Ct. 611, 37 L. Ed. 432; Ohio Oil Co. v. Thompson, 8 Cir., 120 F.2d 831, certiorari denied, 314 U.S. 658, 62 S. Ct. 112, 86 L. Ed. 528. But the mandate is controlling only as to matters within its compass. Lower courts are free as to other matters over which they have jurisdiction. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184; In re Sanford Fork & Tool Co., supra; Mason v. Pewabic Mining Company, 153 U.S. 361, 14

S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58, certiorari denied, 307 U.S. 648, 59 S. Ct. 1045, 83 L. Ed. 1527; Ohio Oil Co. v. Thompson, supra."

It is equally settled that a lower court may examine the opinion and mandate to determine what was, in fact, encompassed within the command of the mandate to the end that matters not so encompassed may be considered in the usual manner. As stated by the Eighth Circuit in *Ohio Oil Co.* v. *Thompson*, (C.A. 8th, 1941) 120 F.2d 831, 835:

"It often happens that the appeal to the Supreme Court does not involve all the issues pending in the inferior court; or that the decision and mandate of the Supreme Court leave some question open for the determination of the inferior court; or that in further proceedings in which the appeal occurs new issues may arise and new parties may join or be joined in the litigation. In all such cases the decision of the lower court upon such matter may be reviewed by the proper court. Ex parte The Union Steamboat Company, 178 U.S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084; In re City of Louisville, 231 U.S. 639, 645, 34 S. Ct. 255, 58 L. Ed. 413; Mason v. Pewabic Mining Co., 153 U.S. 361, 14 S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58. On remand the inferior courts are free as to all issues not within the compass of the mandate. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.

"The decision of the district court of issues not submitted to the Supreme Court, of new issues, and of questions left open may be appealed to the Circuit Court of Appeals in all cases where that court would otherwise have jurisdiction. Mason v. Pewabic Mining Co., supra; Illinois Bell Telephone Co. v. Slattery, supra.

"In appeals to this court from decisions of the district court on questions arising in proceedings subsequent to the mandate of the Supreme Court, we may examine the opinion and mandate of that court to determine whether or not the decision is upon a question left open, upon a new issue, or upon some matter properly appealable to this court. . . ."

The distinction between the "construction" of a mandate and an examination of it to determine what was decided and what left open was the subject of discussion in *Illinois Bell Telephone Co.* v. *Slattery,* (C.A. 7th, 1938) 98 F.2d 930, wherein the Court, after noting that the particular issue presented to the Court of Appeals had not been passed upon by the Supreme Court, said:

"It would seem that the construing of a mandate presupposes that a problem has been presented to an Appellate Court and that the Court has passed upon the problem and returned it to the lower Court with its command. . . ."

In *Re Sanford Fork & Tool Company,* 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414, the Court said:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. . . ."

ALSO

". . . But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. Hinckley v. Morton, 103 U.S. 764; Mason v. Mining Co., 153 U.S. 361, 14 S. Ct. 847; Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U.S. App. 97, 2 C.C.A. 542, and 51 Fed. 929. . . ."

In *Ex parte Union Steamboat Company,* 178 U.S. 317, 20 S. Ct. 904, 44 L. Ed. 1084, the Court said:

". . . The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (Re Sanford Fork & Tool Co., 160 U.S. 247, 256, 40 L. Ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled. . . ."

And when a lower court looks to see what was encompassed within the mandate to determine the "law of the case" thereby established, the search is to ascertain what was actually decided by the higher court.

As stated in *Hansen & Rowland* v. *C. F. Lytle Co.*, (C.A. 9th) 167 F.2d 998:

". . . The principle here applicable is that a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and re-appeal. Mutual Life Ins. Co. v. Hill, 193 U.S. 551, 553, 554, 24 S. Ct. 538, 48 L. Ed. 788; Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552, 562, 45 S. Ct. 441, 69 L. Ed. 785; Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 135, 136, 41 S. Ct. 276, 65 L. Ed. 549; Georgia Railway & Electric Co. v. Decatur, 297 U.S. 620, 623, 624, 56 S. Ct. 606, 80 L. Ed. 925; New York Life Ins. Co. v. Gamer, 9 Cir., 106 F.2d 375, 376, 377; cf. Angel v. Bullington, 330 U.S. 183, 192, 193, 67 S. Ct. 657, 91 L. Ed. 832."

In *Mutual Life Insurance Co.* v. *Hill*, 183 U.S. 551, 24 S. Ct. 538, 48 L. Ed. 788, the leading case on the subject, the Court said:

". . . When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been com-

> mitted so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. . . ."

Hill was followed on the point in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U.S. 552, 45 S. Ct. 441, 69 L. Ed. 785.

In *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 41 S. Ct. 276, 65 L. Ed. 549, the Court, in applying the rule, said:

> ". . . Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. . . ."

Ballard v. *United States*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832, holds that a respondent to a petition for certiorari to the Supreme Court does not waive points not presented by the petition for decision.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1256

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner has filed what it terms a reply brief to the brief of Respondent, in which certain new matter is injected, and to which this supplemental brief is a response [Rule 24(5)]. In the main, the new matter thus injected is the same as that presented by Koehring to the Court of Appeals and it could and should have been presented, if relied upon, in the petition for writ of certiorari. The following answers to the new matter are submitted:

I

Petitioner argues that issues other than that of transfer-jurisdiction were presented to this Supreme Court on the former review of the jurisdictional question because, it is said, Hyde itself "presented to this Court the issues it now contends were not discussed or decided by this Court." In our reply brief in the Court of Appeals we said and now repeat:

Koehring argues that the United States Supreme Court has decided everything. This claim is made despite the fact that the single question stated in the petition for certiorari was that of the effect of an "instanter-transfer" order of the Fifth Circuit. It is argued that Hyde's petition for rehearing "broadened the scope of the Supreme Court's review." No authority is cited for this novel contention. The issues outside of the "transfer" point were expressly *not* raised. The petition stated, for example (R. 174):

> ". . . We do not ask this Court to pass upon those important questions which were before the Court of Appeals and which remain unresolved by that Court. We would not conceive this to be appropriate or in conformity with precedent or established appellate practice, or the statutory scheme designed to relieve the litigation load of this Court by providing for appellate functions in the Court of Appeal."

II

Next Petitioner says that Koehring did not reject the Federal forum because it filed an action in the Oklahoma Federal Court on a matter arising out of the same transaction. But this was a Miller Act suit for the purchase price of the large concrete plant and the law was and is so well settled against coverage of such claims by the Miller Act that the suit was promptly dismissed for want of jurisdiction

over the parties and subject matter.[1] It remains only to be added that Koehring sought no declaratory judgment in that action to determine its liability to Hyde for breach of the contract involved. Even had it done so, this would not have divested the State Court of jurisdiction over the *in personam* aspects of the controversy. The opinion of the Court of Appeals took note of the filing and dismissal of this spurious Miller Act complaint (388 F.2d at 503).

III

Petitioner then argues that there was no election not to remove the State Court action to the Federal Court because it relied upon alleged representations of Hyde's counsel. This statement is completely false[2] and has absolutely no support in the record. Koehring's reference to "(R. 150-152)" finds nothing more than a bare unverified allegation in Paragraph VII of Koehring's counterclaim pleading in the District Court, which allegation is categorically denied in the Answer thereto (R. 154).

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1. In this case, Cause No. 5236 in the United States District Court for the Northern District of Oklahoma, Judge Bohanan wrote in his conclusions of law dismissing the action that: "The Court further holds that the claims asserted by the plaintiff against the defendants do not fall within the purview of the Miller Act, and the Court therefore does not have and never did have jurisdiction of the subject matter of this case."

2. There was presented to the Court of Appeals an exchange of correspondence between counsel which demonstrated beyond question that the delay in filing Koehring's answer (not any petition for removal) was the result of an agreement for the accommodation of Koehring's local counsel. It was shown that the only agreement was that no answer need be filed in the State Court action pending further notice from Hyde's counsel. Such notice was given on December 5, 1962, and pursuant thereto Koehring filed an answer and general appearance without objection, and this was done seven and one half months prior to the decision of the interlocutory appeal by the Fifth Circuit.

This same argument, dehors the record, was made below and was resolved by the Court of Appeals with the statement in its opinion that:

> "Koehring did not seek to remove this action to the Federal Court."
> (388 F.2d at 503)

IV

It is argued that Petitioner defended itself in the Mississippi State Court action because it saw no other choice. If this be true, it is only because it did not wish to see. Actually, it chose to pursue its contentions in first one court and then another, and to shift at will whenever a favorable decision was not immediately forthcoming. One such shift was to obtain the stop order in the Oklahoma District Court on March 14 because it did not like the proceed order of the State Court received on March 10.[3]

Koehring chose to proceed in both courts in the hope of availing itself of the most favorable result.[4] It is too late now, we submit, after Koehring has fully participated

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3. This resulted from a hearing which Koehring itself initiated when no restraining order was outstanding from any court.

4. Even now Koehring continues to play both hands. Note that the Order directing re-trial in Oklahoma provides that "Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein." (R. 163, par. 1). In authoring this ingenious decree, Koehring has sought to build in for itself insurance against the possibility that a judgment in Oklahoma on a re-trial might *exceed* the one rendered by the State Court, where Koehring was successful in eliminating one large segment of damages claimed in the suit and on which proof was held to have been deficient; and also against the possibility that the ad damnum clause might be expanded on new proof of damages. The item of damages eliminated was for "winter protection" of the concrete in place, amounting to $51,733.71, which was disallowed by the Supreme Court on Koehring's appeal. See 178 So.2d 854.

in the State Court proceedings to launch a collateral attack on the final State Court judgment which resulted from those proceedings. Had it entirely won its case in the State Court, its present contention that the State Court was not privileged to proceed would be inaudible.

The Court of Appeals stated in its opinion:

> ". . . The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed. Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. . . ."
>
> (388 F.2d at 510)

V

Finally, Petitioner says that Respondent questions why it did not file a petition for certiorari from the Mississippi Supreme Court's decision and suggests as a reason that this Supreme Court of the United States had precedently rendered its decision on Petitioner's first petition for certiorari involving the transfer-jurisdictional question, and that Petitioner interpreted this Court's decision to mean that the Oklahoma Federal Court's decision had been affirmed.

In this connection it is a matter of controlling significance that the decision of this Court in the case styled *Koehring Company* v. *Hyde Construction Company, Inc.*,

382 U.S. 352, 86 S.Ct. 522, 15 L.Ed.2d 416, was called to the attention of the Supreme Court of Mississippi on the petition for rehearing in that court, and the court expressly held that the decision of the United States Supreme Court referred to did not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree in question. See *Koehring Company* v. *Hyde Construction Company, Inc.*, (Miss. 1966), 182 So.2d 580, the Court concluding as follows:

> "During the pendency of the suggestions of error, the United States Supreme Court, in an opinion delivered January 17, 1966, in 86 S.Ct. 522, styled Koehring Co. v. Hyde Construction Co., Inc., reversed the decision of the United States Circuit Court of Appeals, 10th Circuit, reported as Hyde Construction Company v. Koehring Company, 348 F.2d 643 (10th Cir. 1965), and held that the United States District Court for the Northern District of Oklahoma had acquired jurisdiction in that case on March 11, 1964.
>
> "As we read the January 17, 1966, decision of the United States Supreme Court, referred to above, it does not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree affirmed by this Court."

The question of whether the Supreme Court of Mississippi mis-applied or mis-read the decision of this Court in *Koehring Company* v. *Hyde Construction Company, Inc.*, supra, was also a Federal question, voluntarily submitted by Koehring to the State Supreme Court, which if erroneously decided, was itself equally subject to review only by the Supreme Court of the United States on petition for the writ of certiorari. [Cf. Rule 19(1)(b)].

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1256

KOEHRING COMPANY, *Petitioner*

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent

REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent's brief in opposition has raised several arguments which seem to require a reply.

In the Petition it was pointed out that on review of the same September 1, 1964 injunction order involved here, this Court denied Hyde's request for further review by the Tenth Circuit and remanded this case directly to the Oklahoma Federal Court for further proceedings. Respondent contends on pages 13-15 of its brief that only the transfer jurisdiction issue was presented to this Court at that time.

That simply is not the fact. Respondent, itself, in its Petition for Rehearing and Motion to Amend Order of Remand, filed with this Court in January 1966, presented to this Court the issues it now contends were not discussed or decided by this Court. (Appendix to G Petition). If this Court, by its refusal to remand to the Court of Appeals, did not intend to settle the validity of the September 1, 1964 order, the subsequent remand directly to the Oklahoma District Court had no meaning whatsoever. That court had clearly stated that the only proceeding it intended to carry on was the retrial of the case and this was expressly recognized by this Court in its January 17, 1966 opinion. (Appendix F to Petition).

Respondent also argues that Petitioner rejected the Federal forum. Nothing could be further from the truth. In discussing Petitioner's motion to dismiss the Mississippi Federal Court case, Respondent failed to mention the fact that Petitioner filed a suit against Respondent in the Oklahoma Federal Court on August 31, 1961, one day after Respondent filed its suit in the Mississippi Federal Court. Petitioner's suit arose out of the same transaction as did that of Respondent. If Petitioner had been successful in its motion to dismiss the Mississippi Federal Court suit, Respondent's claim would have become a compulsory counterclaim in the Oklahoma Federal Court suit under Rule 13(a) of the Federal Rules of Civil Procedure.

Respondent also argues that Petitioner "elected" not to remove the Mississippi State Court action to the federal court. The "election" was made in reliance on representations of Respondent's counsel. Respondent's counsel had assured Petitioner that the state court suit had been

filed merely to protect Respondent in case *jurisdiction* was not upheld in the Mississippi Federal Court action, and that the state court action would be dismissed by Respondent if federal court jurisdiction were maintained (R. 150-152). Almost fifteen months later, although federal court jurisdiction had been maintained, Respondent's counsel first demanded that Petitioner file an answer (R. 256-59). Of course, the time to remove the case has long since passed.

Petitioner defended itself in the Mississippi State Court action because it saw no other choice. It did, however, take the position throughout the state court proceedings that the federal case should be tried first. In its answer, and repeatedly thereafter, it pleaded for dismissal or for a stay pending final disposition of the federal suit. (R. 277-279). Petitioner proceeded to trial only when ordered to do so by the Mississippi State Court. Inexplicably, the state court was unwilling to follow the general practice that a later filed action be held in abeyance pending determination of an earlier filed action between the parties involving the same issues.

Finally, Respondent questions why Petitioner did not file a petition for certiorari from the Mississippi Supreme Court's decision. This Court, in the meantime, had announced its decision on Petitioner's first petition for certiorari. 382 U.S. 362 (Jan. 17, 1966). Petitioner interpreted this Court's decision to mean that the Oklahoma Federal Court's decision had been affirmed* and, therefore, that there was no need to proceed with alternative procedures (such as review of the Mississippi Supreme Court's decision) to attain the same result.

*The Oklahoma Federal Court, in denying Respondent's motion to dissolve its injunction, interpreted this Court's decision in the same manner. (R. 245-246).

For the foregoing reasons, it is submitted that Koehring's petition for certiorari should be granted.

Respectfully submitted,

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Dated April 25, 1968